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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 1395

CARMINE G. DESAPIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction.

OPINION BELOW

The opinion of the Court of Appeals is still unreported. It is set forth in Appendix A to this petition.

JURISDICTION

The opinion of the Court of Appeals was filed November 16, 1970. The Court of Appeals denied a petition for rehearing and rehearing in banc on December 28, 1970; its orders are set forth in Appendix B. The time for filing of this petition was extended until February 26, 1971, by order of Justice Harlan, entered January 20, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was based on 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

(1) The Fifth and Sixth Amendments to the United States Constitution.

(2) 18 U.S.C. §§ 371, 1951 and 1952.

(3) Rule 14 of the Federal Rules of Criminal Procedure.

These provisions are set forth in Appendix C to this petition.

QUESTIONS PRESENTED

1. (a) Whether the acts and out-of-court statements of a secret government informer, who was working with federal government agents and providing them with information during the course of the alleged conspiracy, should be received in evidence under the coconspirator rule in a federal conspiracy case?

(b) Whether the Due Process Clause of the Fifth Amendment and the supervisory authority of the federal courts over the administration of criminal justice permit the government to obtain a conviction on the basis of the activities and testimony of a secret government informer permitted by the government to commit serious crimes and given virtually no supervision and control by law enforcement officers while he is developing the government's case?

(c) Whether *in camera* inspection by the trial court, resulting in denial of defense access to documents and gov-

ernment reports regarding the operating relationships between federal law enforcement officers and a secret government informer, is consistent with the Fifth and Sixth Amendments and the fair administration of justice?

2. Whether the out-of-court statements of an alleged coconspirator, made after the frustration of the objectives of the alleged conspiracy and not in furtherance of them, are admissible against another alleged coconspirator in a federal conspiracy case?

3. Whether a federal criminal conviction can stand under the Due Process Clause and the supervisory authority of the federal courts when: a key government witness gave seriously mistaken identification testimony; the prosecution used this testimony to accuse the defense of suborning perjury; and the prosecution failed to disclose to the defense that the witness had participated in a suggestive photographic identification procedure during trial in the absence of defense counsel and had been unsure of the identification to which she later positively testified at trial?

4. Whether a defendant should be granted a severance in a federal conspiracy case when: the defenses are antagonistic; the co-defendant is identified as a participant in a pre-existing conspiracy not involving the defendant; and the codefendant does not testify but his counsel, in violation of professional ethics, informs the jury that the bulk of the prosecution evidence is true in order to further his own defense strategy?[1]

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[1] Since this Court presently has before it *United States* v. *White*, No. 13, O.T. 1970, argued October 20, 1970, we also wish to preserve and present the question whether petitioner's constitutional rights were violated by the admission in evidence of a tape of his inter-

STATEMENT OF THE CASE

1. *Introduction.*

Petitioner was convicted of one count of conspiracy to violate (a) 18 U.S.C. § 1951, which prohibits the obstruction of commerce by extortion, and (b) 18 U.S.C. § 1952, which prohibits interstate travel or use of any interstate facility to commit bribery of a state official.[2] He was also convicted of two counts of violating 18 U.S.C. § 1952. He was sentenced to terms of two years imprisonment on each count, to run concurrently, and to fines of $1500 on each count.

Petitioner was tried jointly with an alleged coconspirator, Antonio Corallo.[3] A third defendant, Henry Fried, had his case severed before trial because of illness. Named as coconspirators—but not defendants—were Herbert Itkin and James Marcus, who was the New York City Commissioner of Water Supply, Gas and Electricity at the time of the events out of which this case arose.

In essence, the prosecution alleged a conspiracy by these five men to obstruct the Consolidated Edison Company of

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view with the county district attorney's office, which was surreptitiously recorded without his knowledge or consent. We will not argue this point further in this Petition.

[2] In this Statement of the Case, we adopt many of the facts as recited by the Court of Appeals opinion in Appendix A, supplemented by references to the transcript of proceedings where appropriate. References to the Court of Appeals opinion are cited herein as "O. ——". References to petitioner's printed appendix in the Court of Appeals are cited as "A. ——". Transcript references are cited as "Tr. ——".

[3] Corallo was convicted of one count of violating 18 U.S.C. § 1952 and acquitted of one count of conspiracy and one count of violating § 1952. A fourth count, charging use of telephone facilities within the City of New York in connection with the alleged bribery, was dismissed against both men prior to trial.

New York (hereinafter Con Ed) from securing permission from the City of New York to reconstruct and enlarge a power transmission facility known as the "high line", a portion of which ran on top of a City-owned right-of-way in Westchester County. It was charged that the conspirators planned to have Marcus withhold a permit for the "high line" project until Con Ed agreed to grant construction contracts to companies owned and controlled by Fried. Marcus was to receive bribes from the others for misusing his office in this manner and the coconspirators were to share in the proceeds of the contracts thereby extorted from Con Ed. (O. 2a-3a)

The prosecution's theory was that there was a pre-existing conspiracy between Itkin, Marcus, and Corallo to misuse Marcus' office. There was no suggestion or charge that petitioner had anything to do with the instigation of the alleged conspiracy against Con Ed, or that he had any part in the initial approaches to Con Ed by the others. Rather the prosecution's theory was that Fried brought petitioner into the already formed conspiracy in August 1967 to advise the others how best to achieve their objectives as to Con Ed. (O. 3a-5a)

Petitioner denied any involvement in the alleged conspiracy. The Court of Appeals considered his appeal on the basis "that the case was a close one and that, in consequence, errors that might be regarded as non-prejudicial in an open-and-shut trial would be grounds for reversal here." (O. 13a)

2. *The Role of Itkin.*

(a) *Itkin's Evidence Against Petitioner.*

Itkin was the prosecution's principal witness implicating petitioner in the conspiracy and the related substantive

counts. Through Itkin the prosecution sought to prove petitioner's alleged entry into the conspiracy and his alleged advice on the high line project. (Tr. 452, 460-62, 465-68, 470-74, 491-93, 596-97, 600-2, 611-13). In addition, a trip and a phone call by Itkin across a state line provided the sole basis for the two substantive counts; these acts also constituted the interstate travel and use of interstate facilities encompassed in the conspiracy count and charged as overt acts in furtherance of the conspiracy.[4] Further, Itkin testified to the receipt of money from petitioner on behalf of Fried, which was allegedly to be divided between Itkin and Marcus for their efforts on the "high line." (Tr. 614-22).

Itkin's out-of-court statements were admitted against petitioner under the coconspirator rule. Marcus testified that he received and carried out instructions from Itkin for dealing with Con Ed, which Itkin told him came from petitioner. (Tr. 141-42, 146, 152-53, 160-61, 165-66). Marcus also was advised by Itkin that petitioner was arranging for a payoff to him. (O. 8a; Tr. 157, 171-72). Marcus acknowledged that he had never met or spoken to petitioner and that all his information about petitioner came from Itkin. (Tr. 182-83, 209). In addition, out-of-court statements by Itkin about petitioner appeared on tapes of meetings between Itkin and the other alleged conspirators, which Itkin surreptitiously recorded. Petitioner was not

[4] Itkin testified that at Fried's invitation, he travelled through New Jersey to meet petitioner at the opening of Fried's horse farm in August 1967. (Tr. 452-54, 456-62). There was no evidence that petitioner had a part in the invitation or had authorized Itkin's trip; the trial court, however, permitted the jury to find that petitioner was responsible for the route taken. (Tr. 2582-83; 2603, 2698; see also 1763-64, 1786-88). Itkin also testified that in October 1967 he placed a call from New York City to Marcus at the latter's summer home in New Jersey to confirm certain arrangements in the alleged conspiracy. (Tr. 597-99).

present at any such meetings. (O. 9a; A. 21a-53a; Tr. 502, 589)

(b) *Itkin as a Secret Government Informer.*

The defense repeatedly objected to Itkin's testimony and out-of-court statements and acts on the ground that he was a government agent or informer. (*E.g.*, Tr. 479-80, 1752-53). The Court of Appeals recognized that if Itkin "was not a genuine member of the conspiracy, much testimony was wrongly received." (O. 19a).

Itkin began working with the CIA in 1954 as an undercover agent. Because of the information he gained in that capacity regarding alleged local criminal activities, he was introduced by the CIA to the FBI. Itkin testified that he went to work for the FBI in 1963 and "worked closely" with the Bureau as an "undercover agent or an informant" through December, 1967, or January, 1968, which included the period of the conspiracy alleged in the present case. (Tr. 636-38). He communicated three times a week with his FBI contact during this period (Tr. 639, 711, 867, 1810, 1853-54). He was authorized by the FBI to pick his own targets and develop areas for infiltration on his own: "Whatever I did, I was infiltrating, I was picking and choosing as it came." (Tr. 927, 926-27, 1862-63).[5]

He began reporting to the FBI on Marcus' corruption in late spring of 1967, prior to any dealings on the "high line" and prior to petitioner's alleged entry into the conspiracy[6] (Tr. 1813-15). The Court of Appeals stated that

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[5] Itkin's FBI contact, Agent Vericker, testified: "[H]e [Itkin] would ask if we were interested in this particular party and I would say yes, if the party was a labor racketeer, a political figure, a member of the organized group." (Tr. 1862-63)

[6] He specifically advised the FBI that he was going to gather and document information on Marcus' corruption. (Tr. 1814-15)

"At least from mid-summer of 1967 Itkin kept the FBI informed of the conspiracy's progress." (O. 16a). Itkin said that throughout all his dealings on the "high line" and his alleged contacts with petitioner, it was always his intention to turn over information to the FBI (Tr. 923-25, 748, 817-20, 823, O. 17a). He testified that he prearranged the taped meetings with other conspirators for the purpose of providing evidence for the government. He turned these tapes over to the FBI during the pendency of the alleged conspiracy. (Tr. 727, 731-35, 748) He said that his "'primary motive was never to make the money.'" (O. 17a, Tr. 925-26). The Court of Appeals concluded that he "doubtless did not expect to be prosecuted" for his role in the alleged conspiracy. (O. 19a).

In sworn affidavits which he acknowledged during the trial, Itkin further illuminated his relationship with the government at the time of the events in the present case. (Tr. 650-53, 654-58, 649-53). In an affidavit filed in the Westchester County Family Court in 1969, he stated that he worked for both the CIA and the FBI, and:

> "[B]ecause I was an experienced trial attorney, both Agencies learned to rely on my judgment and constantly expanded my discretionary powers to carry out designated missions, evaluate situations, gather admissible evidence, and report when I felt that I had sufficient admissible evidence on which said Agency could rely and act." (Appendix to Petitioner's Reply Brief in the Court of Appeals, A-15; see also Tr. 654-58).

Itkin also removed state-court indictments involving his dealings with Marcus to the federal court, invoking 28 U.S.C. §1442(a)(1), which authorizes removal by "[a]ny officer of the United States or any agency thereof, or person

acting under him, for any act under color of such office . . . ." (Tr. 650-53).[7]

The trial court refused requested instructions that Itkin was not a coconspirator as a matter of law because of his relationship with the government, and alternatively, that if the jury determined he was a government agent, employee, or informant, they could not consider him a conspirator. Instead, the court told the jury that if they believed Itkin and the FBI contact Vericker, they should deem Itkin to have been a conspirator; on the other hand if they did not believe Itkin and Vericker and determined "that the FBI specifically instructed or authorized Itkin to participate in the Con Edison scheme from the very beginning, then you could determine that Itkin was not a conspirator as contemplated by the law." (Tr. 2679). The court also instructed that, to acquit on the substantive counts, the jury had to determine that Itkin contrived to travel to Fried's farm via New Jersey and to call Marcus in that state for the sole purpose of conferring jurisdiction on the federal courts. (O. 20a, Tr. 2697).

(c) *The Government's Encouragement of Itkin's Criminal Conduct and Failure to Supervise and Control Him.*

Itkin was involved in extensive criminal activity for a period of several years up to and including the events in

[7] Itkin's petition for removal stated that during the period specified he was an informer for the FBI and performed the acts specified in these indictments under color of his office and in performance of his duties. Itkin was supported in his petition by the FBI, the CIA, and the U. S. Attorney, who filed an affidavit and argued orally in his behalf. The District Court denied the State's motion to remand, *People* v. *Itkin*, 69 Civ. 3931, S.D.N.Y., July 7, 1970; the Court of Appeals denied the State's petition for a writ of mandamus, *People* v. *Cooper;* and this Court denied the State's Petition for Certiorari, *New York* v. *Cooper*, No. 825, O.T. 1970, January 12, 1971.

the present case. He had kept several hundred thousand dollars in illegally obtained money from various criminal ventures. (*E.g.*, Tr. 661-67, 1119-21) In addition, he instigated and fostered the commission of crimes: it was Itkin who first suggested criminal activity to Marcus, brought about Marcus' corruption of his office and induced Marcus to commit perjury before a state grand jury investigating Marcus' corruption. (Tr. 105-20, 180, 184, 426-34). Itkin utilized deception and threats to ensnare Marcus in the present conspiracy. (Tr. 476-77, 1003) For years the FBI had knowledge that Itkin was engaged in criminal activities, including the present conspiracy, and "knew that Itkin 'had obtained illegal money'." (O. 17a, Tr. 1808-09, 1876; see also Tr. 662, 1126). Yet the FBI took no action to stop his criminal activities.

In addition, the FBI failed to provide close supervision and control over Itkin's activities in the present case. The FBI did not utilize surveillance or any other techniques to secure corroboration of Itkin's alleged contacts with petitioner: the record is devoid of any FBI testimony independently confirming any of the purported meetings or conversations between Itkin and petitioner.

The Court of Appeals stated:

> "The FBI's conduct indeed went far beyond the familiar cases of the revenue agent approached with a corrupt proposal who, after reporting it to his superiors and on their instructions, acts out the drama which is closely surveilled and often wired for sound [citing *Lopez* v. *United States*, 373 U.S. 427 (1963)]; or of the narcotics agent who plays an equivalent role in a pusher's home [citing *Lewis* v. *United States*, 385 U.S. 206 (1966)]. In such instances, while the government agent participates in a transaction having the elements of a crime, it is one without adverse social conse-

quietness; there is no intention that the revenue agent will keep the bribe or that the narcotics agent will sell the narcotics. Here the FBI sat by while people extorted money to induce official action, with knowledge that they planned to keep it for their own use." (Tr. 178-180) (emphasis supplied)

(d) The Trial Court's Refusal to Allow Defense Inspection of Documents Regarding Itkin's Relationship With Federal Law Enforcement Agencies.

In order to prove Itkin's status as a government agent or informer, the defense requested permission to inspect CIA and FBI reports showing Itkin's relationship with federal law enforcement agencies. (Tr. 343) The defense also requested certain documents, including an affidavit of the CIA, contained in a sealed file in Itkin's removal case. (Tr. 300, 373-81) The material, which was voluminous, was inspected by the trial court in camera. Only a small portion, which the trial court decided was relevant to the facts of this case, was turned over to the defense. The trial court stated that the remainder of the material was not relevant to proof of Itkin's status. (Tr. 483, 526-28, 541-42)

3. The Out-of-Court Statements of Fried.

The Court of Appeals found that "the only testimonial support for Itkin's story of payments by De Sapio" was provided by out-of-court statements of the codefendant Fried admitted under the coconspirator rule. (O. 21a)[3] Fried did not testify at the trial. These statements were objected to on the grounds that they were made after termination of the alleged conspiracy and not in furtherance of it, since they followed the resignation of Marcus as

[3] None of the money allegedly paid by petitioner to Itkin was ever produced.

Commissioner and the indictment of Fried, Marcus, Itkin, and Corallo on a prior conspiracy. (*E.g.*, Tr. 1259-63, 1360-62, 1369-72, 1773-78)* The Court of Appeals conceded that "if there were error in receiving Fried's statements, this would be sufficiently serious to require reversal . . . ." (O. 21a)

Fried's out-of-court statements were presented through the testimony of two former Con Ed officials, Hadden and Crawford. Hadden testified that on December 13, 1967—the day after Marcus resigned as Commissioner (O. 12a; Tr. 172)—he invited Fried to lunch and expressed concern over the possibility of scandal. Fried said that he had paid $20,000. (O. 12a; Tr. 1264-65) Although this statement did not mention petitioner, the prosecution sought to connect it to him through subsequent statements allegedly made by Fried. (Tr. 1385-86)

Crawford testified that after the publicity over Marcus' resignation and the indictment of Fried, he was instructed to remove Fried from the list of contractors authorized to bid for Con Ed projects. (Tr. 1357, 1416-17) Fried had $5 to $10 million of contracts a year with Con Ed on matters unrelated to the "high line." (Tr. 1356) Crawford summoned Fried to his office on January 5, 1968, and told him that he had been dropped from the approved bidding list. Fried protested the action and, according to Crawford's testimony:

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*The prosecution charged two conspiratorial purposes: (a) extortion under color of Marcus' office (see Tr. 1785) and (b) bribery of Marcus in his official capacity. The defense contended that after Marcus' resignation and the indictment of Fried and the other conspirators, the alleged conspirators could no longer utilize Marcus' office to pressure Con Ed to award contracts to Fried and Fried could no longer expect Con Ed to depart from its established practices to favor his companies.

> "[Fried] said out of the clear blue sky 'Well, you know $20,000 has been provided to Mr. Marcus', and that there was a luncheon at which this matter was discussed and present were C. D. and J. H. . . . this was for the transmission line in Westchester. . . . [Fried] again referred to the luncheon and this time he did not use initials for people, he said that Mr. Hadden, Mr. Gerald Hadden, and Carmine De Sapio were present at that luncheon." (O. 12a-13a; Tr. 1358-59)

On January 8, 1968, Fried again went to Con Ed, this time in response to a request from Hadden. Crawford testified that Fried said:

> "There's going to be a full expose. Mr. DeSapio has been subpoenaed; I, Mr. Fried, expect to be subpoenaed'. . . . 'Mr. DeSapio has to be made whole, and I, Mr. Fried, can take care of that.'" (O. 13a; Tr. 1386)

According to Crawford, Fried asked to see other Con Ed officials to ask for restoration to the bidding list. His request was refused. Crawford disclaimed that Fried sought any preference from Con Ed because of the "high line" dealings. (O. 12a; Tr. 1386-87, 1418-19)

The prosecution asserted throughout the trial that Fried made these statements in an attempt to pressure Con Ed to give him illegal contracts as a *quid pro quo* for his efforts to help the company obtain the "high line" permit. (Tr. 55, 1259-61, 1362, 1371-72, 1781-82, 2619-20, 2623)

The trial court admitted the statements on this theory. (Tr. 1369-72, 1776-77a). Over defense objections (Tr. 2745), it permitted the jury to consider the conspiracy as extending through January 8, 1968, when Fried had his last conversation at Con Ed. (Tr. 1372, 2687-88)

The Court of Appeals explicitly rejected the prosecution's trial theory that "Fried entertained any belief, at

least on January 5 and 8, 1968, that he could obtain the high line contract from Con Ed without competitive bidding . . . . Fried was far too sophisticated to believe that the new Con Ed management would expose itself to suspicion, or worse, by departing from established bidding procedures in favor of a man just indicted for having given a kickback to the former Water Commissioner." (O. 20a) The Court of Appeals concluded that "Fried's objective on January 5 and 8 was simply to be restored to the competitive bidding list" of Con Ed (O. 22a).

The Court of Appeals, however, upheld the admission of the Fried statements on a new theory of the conspiratorial objectives, one neither pleaded, tried, nor argued below and inconsistent with the prosecution's trial theory. The Court of Appeals found that Fried, rather than seeking illegal contracts in payment for his "high line" activities, was seeking lawful contracts from Con Ed in order to reimburse petitioner for advances he allegedly made during the conspiracy. (O. 22a-23a)[10]

4. *The Mistaken Testimony of Sister Ann James and the Prosecution's Undisclosed Evidence About It.*

A central event in the prosecution's case was Itkin's description of a purported meeting with petitioner and Fried on the grounds of Fried's horse farm at the opening in August 1967. (Tr. 461-62) Petitioner attended the opening, but denied that there was any such meeting.[11]

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[10] The prosecution in closing argument to the jury had stated: "He [Fried] doesn't care about the $20,000. . . . He wants to get the message across to the new chairman [of Con Ed] that 'this is the way you get things done, and you had better start throwing things my way if you don't want to have any more trouble with Marcus.'" (Tr. 2620)

[11] Whether this meeting occurred was crucial in a number of respects: (a) it marked petitioner's alleged entry into the conspiracy; (b) it provided a federal jurisdictional basis for the

According to the testimony of a defense witness, Harold Daniels, this meeting could not have occurred because Fried was suffering from the gout that day and could not walk about the grounds; Daniels said that Fried had been continuously in his company and had been confined to a bus which gave guests tours of the farm grounds the whole afternoon. (Tr. 2189-90, 2194-95) The Court of Appeals stated that if Daniels' testimony was believed, "it would have shattered" Itkin's account of his meeting with petitioner. (O. 25a)

To rebut Daniels' testimony, the prosecution called several witnesses to say that they had seen Henry Fried at various places on the farm during the afternoon in question. The Court of Appeals said that "very likely the most impressive" of these witnesses was a Carmelite nun, Sister Ann James. (O. 31a) She testified that she had seen "Mr. Fried" walking on the grounds and that she did not believe he was on the bus when she entered it for a tour. (O. 26a, Tr. 2296-97).

In closing argument the prosecutor accused Daniels of lying and further stated: "Mr. De Sapio had to call upon his friend, Harold Daniels, to do that, to bring the corruption right into the courtroom. . . ." (Tr. 2577, 2576-79) He cited the testimony of Sister Ann James and said in reference to Daniels' testimony: "This should outrage you, this perjury." (Tr. 2578)

After petitioner's conviction, an evidentiary hearing on a motion for a new trial disclosed the following facts about

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prosecution, since Itkin allegedly traveled to the farm via New Jersey; (c) it was specified as an overt act of the conspiracy; and (d) it offered the defense an opportunity to prove that Itkin's testimony against petitioner was fabricated.

Sister Ann James' testimony, in the words of the Court of Appeals:

> "[*I*]*t turned out that Sister Ann James' testimony was founded on a serious mistake.* On returning to the Home from the courthouse, she had looked for a photograph that had been taken while she was on the farm with 'Mr. Fried'. She found this was Richard Fried; he looked nothing like his brother Henry. . . ." (O. 26a) (emphasis supplied)

The hearing also disclosed that:

(1) Before Sister Ann James testified at trial, the prosecutor had shown her a group of four or five photographs. One of them was of Henry Fried and had his name on it, while the others had no names. (Tr. 2880)[12]

(2) Prior to testifying, she had told the prosecutor that she was "not sure" the man in the photograph, Henry Fried, was the man she had seen walking on the farm that day. (Tr. 2913)[13]

(3) A companion, Sister Theresa, who had accompanied Sister Ann James both to the horse farm and the courthouse, had been unable to identify the photograph of Henry Fried as the man they had seen on the grounds that day.[14]

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[12] In addition, one of the photographs was of a woman. The Court of Appeals called this "a stupid mistake" by the prosecutor. (O. 28a)

[13] The attorney who had accompanied Sister Ann James to the courthouse during the trial and who had been present at the photographic identification, testified at the hearing that Sister Ann James "pointed to one picture and she said, 'I seem to remember that picture, that man, but it is a long time' and she said, 'it's been a long time and I am not sure.' " (Tr. 2913)

[14] The defense was not allowed to call Sister Theresa at the post-trial hearing, but the Court of Appeals accepted that the defense would have proved this fact. Sister Theresa would also have testified that Sister Ann James had expressed doubt to the prosecutor about the identification. (O. 30a)

None of these facts had been disclosed to defense counsel by the prosecutor at or after the trial. Defense counsel had been unaware of the photographic identification conducted by the prosecutor during the trial. The defense had made a request at the close of Sister Ann James' direct examination at trial for "any reports of any kind of interviews" with her. The prosecutor had stated that there were none. (Tr. 2298) In addition, the defense had made a request at the close of all the evidence for all "*Brady* v. *Maryland* material" and all statements of any witnesses casting doubt on their trial testimony. The prosecutor represented that he had no such material. (Tr. 2414)

The Court of Appeals acknowledged that (1) "[I]t might have been better practice for the prosecution to have put the defense on notice of the photographic identification," (O. 29a); (2) "It is a closer question whether the slipup [in showing a photograph with Fried's name on it] created a duty of disclosure that the mere showing of photographs would not," (O. 30a); (3) "[W]e are bound to say that it would have been better if the Assistant District Attorney had revealed Sister Ann James' uncertainty before or during her examination." (O. 30a-31a)

The Court of Appeals, however, held: "Prosecutors under such stress cannot properly be held to standards quite as exacting as those that may be appropriate when they have had days or even weeks to consider whether a disclosure should be made. We thus do not find this to be a case where the defense is entitled to the benefit of 'a fairly low showing of materiality' [citation omitted] of the newly discovered evidence." (O. 31a)

5. *The Antagonistic Defenses of Petitioner and the Co-Defendant Corallo and the Summation by Corallo's Counsel.*

Petitioner's pretrial and trial motions for severance from his co-defendant Corallo were denied. (Tr. 8-13, 114-18, 174, 563-64, 1756, 2449) The defenses of petitioner and Corallo were antagonistic. As the Court of Appeals noted, petitioner denied involvement in the conspiracy and advanced the theory "that his participation had been invented by Itkin to increase Itkin's own stature with the FBI and other prosecutorial agencies." (O. 14a)[15]

Corallo's denial of involvement, however, did not rely on the theory of fabrication by Itkin. Corallo maintained that the prosecution's evidence was accurate, but that it established "that he had not been allowed to participate [in the conspiracy] or that, to such extent as he had been, this was simply a continuation of [an earlier conspiracy] . . ." (O. 14a-15a)

This earlier conspiracy referred to by the Court of Appeals in its opinion involved each of the principals in the present case—Marcus, Itkin, Fried, and Corallo—but not petitioner. It had been the basis of a separate prosecution in which Corallo was convicted.[16] Proof of this earlier scheme was a significant phase of the prosecution's evidence against Corallo in the present case, even though petitioner was not connected in any way with this earlier matter.

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[15] The defense maintained that Itkin was fabricating petitioner's alleged involvement to try to induce the New York County District Attorney's office to drop pending charges against him which were scheduled for trial in the fall of 1967, to induce the federal government to support him in his efforts to remove the state charges in the federal court, or to place himself in a more favorable position with the FBI and other prosecution agencies.

[16] *United States* v. *Corallo,* 413 F.2d 1306 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969).

Corallo's lawyer exposed the jury to the prejudicial impact of this earlier conviction in his summation. To further his own strategy, Corallo's counsel admitted that his client had conspired with Marcus and Itkin in this earlier conspiracy and had received his share of the profits. Moreover, he went on to concede the veracity of most of the prosecution's testimony against petitioner as well.[17] The Court of Appeals acknowledged that his "gushing summation" must have been " 'exasperating' " to counsel "who was making a tight defense on De Sapio's behalf." (O. 15a-16a)

Petitioner moved for a mistrial and renewed his motion for severance on the ground of his inability to receive a fair trial because of the inconsistent defenses and the prejudice resulting from Corallo's admission of involvement in the conspiratorial activities of Marcus and Itkin. The motions were denied. (Tr. 2448-49, 2499) In a side bar conference the trial court merely admonished counsel for Corallo to refrain from giving his personal opinion of the credibility of witnesses. (Tr. 2450) There was no instruction to the jury to disregard the improper statements of Corallo's counsel. The Court of Appeals concluded that the trial court's later general instruction that "lawyers . . . have no right to make any determinations of credibility of witnesses" and that their "comments were argument only" cured any prejudicial effect of the summation by Corallo's lawyer. (O. 16a)[18]

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[17] Corallo's counsel stated: "Why shouldn't I tell you I believe every Government witness? Even the very differences in their stories make me sure they are telling the truth . . ." (Tr. 2437). In referring to Sister Ann James' testimony, Corallo's counsel said that she came in "like an angel, the place lit up." (Tr. 2448)

[18] An additional item of evidence in the case relates to the question presented in footnote 1, p. 3, *supra*. The prosecution intro-

REASONS FOR GRANTING THE WRIT

This case raises novel, important and timely questions concerning the operation of the coconspirator rule in a federal criminal case with respect to secret government informers and post-conspiracy statements; the scope of the Due Process clause and the exercise of the supervisory authority of the federal courts over criminal prosecutions developed through the use of secret government informers permitted to commit serious crimes and subject to minimal supervision and control; the incompatibility with the Fifth and Sixth Amendments and the fair administration of justice of *in camera* inspection of documents and government reports regarding the relationships between secret government informers and federal law enforcement agencies; the obligation of prosecutors under the Due Process clause to disclose evidence favorable and useful to the defense and the proper test for determining the consequences of the non-disclosure of such evidence; and the standards for relief from prejudicial joinder in federal conspiracy cases.

The decision of the Court of Appeals also conflicts in important respects with the decisions of this Court and with decisions of other Courts of Appeals. It sanctions such a departure from fair and accepted procedure in a federal criminal case as to call for an exercise of this Court's power of supervision.

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duced into evidence, over defense objection, a surreptitiously recorded tape of an interview of petitioner by lawyers in the New York County District Attorney's Office. This recording was made in January, 1968, without petitioner's knowledge or consent. The prosecution claimed that this exculpatory statement by petitioner was false. (O. 23a)

I A. The Acts and Out-of-Court Statements of a Secret Government Informer Who Cooperated With Federal Government Agents During the Course of the Conspiracy and Provided Them With Information Should Not Be Received in Evidence Under the Coconspirator Rule in a Federal Conspiracy Case.

The Court of Appeals, in affirming the conviction, interpreted the evidence as proving Itkin was a "genuine" coconspirator with petitioner for purposes of the coconspirator rule. The Court of Appeals conceded that if he were not, "much testimony was wrongly received." (O. 19a) ". . . Marcus' testimony concerning narrations by Itkin would have had to be excluded unless Itkin was a member of the conspiracy." (*Id.*) In addition, if Itkin was not a conspirator, the jurisdictional basis for the two substantive counts against petitioner would disappear, since these were based on Itkin's travel through New Jersey to the Fried horse farm and his telephoning Marcus in that state. (*Id.*) The admissibility of the acts and out-of-court statements of a secret government informer under the coconspirator rule presents an important issue of federal law, on which the circuits conflict and which should be resolved by this Court.

The Court of Appeals clearly misjudged Itkin and the role he played in this case. Its decision to treat him as a coconspirator cannot stand, in view of the undisputed facts about his position as a special undercover investigator and informer for the FBI and the various parts he played in the alleged conspiracy and in creating the evidence which resulted in petitioner's conviction.

a. Itkin initially corrupted Marcus and instigated the conspiracy alleged in the present case.

b. He was the informer to the FBI that the conspiracy was underway and reported on its progress.

c. He engaged in a number of the overt acts which created the evidence to support the conspiracy charge.

d. He went to other members of the alleged conspiracy and made statements implicating petitioner which the government was permitted to use at trial under the coconspirator rule.

e. He set up taped meetings not in the presence of petitioner at which he implicated petitioner by other statements which were later used at trial.

f. He created the federal jurisdiction and the sole basis for the substantive counts by engaging in the only two interstate acts involved in the case.

g. He was the principal witness against petitioner at trial.

Itkin was an instrumentality of the government who packaged and delivered the criminal case against petitioner. The principles of the law of conspiracy and the exception to the hearsay rule allowing the use of a coconspirator's statements never were meant to apply to such a "boot-strap" operation.

Even if Itkin combined the roles of "underworld character and FBI informer" as the Court of Appeals concluded, his acts and out-of-court statements should not have been admissible against petitioner under the coconspirator rule. The vice of treating a secret undercover informer as a coconspirator for purposes of the coconspirator rule is evident. The rule is premised on the assumption of the reliability of statements by persons acting in furtherance of a conspiracy during its pendency. The informer's pur-

pose, however, is to make a case for the government against other members of the alleged conspiracy. If the coconspirator rule applies to him, he has the incentive to proliferate his out-of-court statements implicating others and to perform acts which can later be attributed to the others. The application of the coconspirator rule in such situations would permit "the already pervasive and wide-sweeping nets of conspiracy prosecutions" to be cast with a vengeance. *Grunewald* v. *United States,* 353 U.S. 391, 404 (1957). This is what happened in the present case.

The Courts of Appeals for the Fourth and Fifth Circuits have held that secret government informers cannot be coconspirators as a matter of law. The Fourth Circuit held in *United States* v. *Chase,* 372 F.2d 453, 459 (4th Cir. 1967):

> "[I]t is equally well-established that one who acts as a government agent and enters into a purported conspiracy in the secret role of an informant *cannot be a co-conspirator.*" (emphasis supplied)

See also *Sears* v. *United States,* 343 F.2d 139, 142 (5th Cir. 1969).

The decision of the Second Circuit in the present case conflicts with these decisions. This Court should resolve the conflict and clarify the law as to the applicability of the coconspirator rule to the acts and out-of-court statements of a secret government informer participating in an alleged conspiracy.[19]

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[19] The government's position in the courts below regarding Itkin's status in the present case is inconsistent with the position taken by Itkin, with the support of the government, in his removal case. There he asserted that crimes he committed in connection with Marcus were acts under color of his office as a secret government informer. (Tr. 650-53)

Even if there was an issue of fact whether Itkin was acting as a government agent in the present case, the trial court incorrectly instructed the jury that if they determined that the FBI and Itkin lied and "'that the FBI specifically instructed or authorized Itkin to participate in the Con Edison scheme from the very beginning, then you could determine that Itkin was not a conspirator as contemplated by the law.'" (O. 20a) This definition of agency was too narrow under the circumstances of this case, and it was error on a critical issue. The error was not rendered harmless by defense counsel's failure to object after the charge, since counsel had previously requested a more accurate instruction which was refused. (Defendant's requests for charge Nos. 2 and 3).

B. The Due Process Clause and the Fair Administration of Justice Do Not Permit the Government to Obtain a Conviction Developed by a Secret Government Informer Permitted to Commit Serious Crimes and Subject to Minimal Supervision and Control by Law Enforcement Officers.

The Court of Appeals acknowledged that this case presents an unprecedented situation of law enforcement involving the commission of serious crimes by a secret government informer. (O. 17a-18a) The Court of Appeals noted that the FBI's conduct "went far beyond" the investigative methods and use of undercover agents approved in recent cases of this Court.[20] It recognized that there were serious "adverse social consequences" from Itkin's activities which the government accepted in order to obtain evidence for prosecution. (*Id.*)

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[20] *Lopez* v. *United States*, 373 U.S. 427 (1963); *Lewis* v. *United States*, 385 U.S. 206 (1966).

This Court held in *Sherman* v. *United States*, 356 U.S. 369, 372 (1958):

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, *that function does not include the manufacturing of crime.*" (emphasis supplied)

The government cannot disclaim responsibility for Itkin's crimes. In *Sherman* v. *United States, supra*, this Court held that "The Government cannot disown [the informer] and insist it is not responsible for his actions." 356 U.S. at 373.[21]

The Court of Appeals, however, disclaimed any supervisory responsibility for the government's conduct and relationship with Itkin, primarily on the grounds that the question was inappropriate for judicial determination and would add to the many "collateral issues" now pervading criminal trials. "[S]uch decisions", the Court of Appeals stated, "had best be left to the executive branch, which is accountable for its conduct to Congress." (O. 18a)

There is no justification in the decisions of this Court for judicial abdication of responsibility over improper investigative methods. As Justice Frankfurter wrote in *Sherman* v. *United States, supra*, 356 U.S. at 380 (concurring opinion, joined by Justices Douglas, Harlan, and Brennan):

> "Insofar as they are used as instrumentalities in the administration of criminal justice, *the federal courts have an obligation to set their face against enforcement of the law by lawless means* or means that violate

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[21] *Cf.* Justice Holmes' famous statement:

"... the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained." *Olmstead* v. *United States*, 277 U.S. 438, 470 (1928) (dissenting opinion)

> rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them." (emphasis supplied)[22]

The Court of Appeals' concern over introduction of "collateral issues" is reminiscent of the same contention made against judicial inquiry into the activities of law enforcement officials in *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932). Chief Justice Hughes dismissed the contention there with the comment:

> "considerations of mere convenience must yield to the essential demands of justice." [23]

Fashioning appropriate judicial standards and safeguards for control of investigative activities of secret informers is not beyond the capacities of federal courts. There is no meaningful distinction between fashioning such standards and safeguards for secret informers and delineating the perimeters of valid searches and seizures, detention, electronic surveillance, interrogation, identification, and other investigative techniques.[24]

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[22] In the words of Justice Brandeis:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead* v. *United States, supra,* 277 U.S. at 485. (dissenting opinion)

[23] The present case, unlike *Sorrells*, is not an entrapment case, but the considerations relating to judicial control of investigative methods are analogous.

[24] Numerous commentators have proposed such standards. See, *e.g.*, Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 Yale L.J. 1091 (1951); Note, *Judicial Control of Secret Agents*, 76 Yale L.J. 994 (1967); Note, *Police Undercover Agents*, 37 G.W.U.L. Rev. 634 (1969).

This Court has already begun to fashion necessary standards under the Fourth Amendment to prevent too heavy reliance by law enforcement officers on secret informers to establish probable cause for search and seizure warrants. *Spinelli* v. *United States*, 393 U.S. 410 (1968); *Aguilar* v. *Texas*, 378 U.S. 108 (1963). It is significant that the basis of these decisions is the determination by this Court that there must be sufficient corroboration of an informer's tip to permit the magistrate to make a sound independent judicial finding of probable cause. If this Court has recognized the need for such standards when the issue is probable cause, there is even greater need for protection against secret informers when the issue is guilt or innocence.

Here Itkin was permitted to "free lance" and the law enforcement officers provided very little supervision or control of his actions. Itkin admitted to having wide discretion in making his cases, and the record evidences neglect on the part of the agents who used Itkin to engage in the necessary surveillance and investigation to provide corroboration. The Court of Appeals conceded that Itkin's activities were far removed from those of the government agent who acts under the supervision and instructions of his superiors and carries out his evidence-gathering activities under the close surveillance of governmental investigators in order to produce maximum corroboration for his testimony. (O. 17a)

The important role informers play in many law enforcement investigations is not questioned here. Informer Itkin's activities, however, were inherently perilous to innocent persons whom he might choose to implicate for his own reasons. This is an especially appropriate case for this Court to establish guidelines for law enforcement of-

fleers in the use of secret undercover investigators and informers.[25]

C. The Trial Court's *In Camera* Inspection of Certain Documents and Government Reports Requested by Defense Counsel, Resulting in the Withholding from the Defense of Information Regarding the Operating Relationships Between Federal Law Enforcement Agencies and Itkin, Violated Petitioner's Fifth and Sixth Amendment Rights and the Fair Administration of Federal Criminal Justice.

A principal issue in this case was Itkin's role in the alleged conspiracy—whether he was a "genuine" coconspirator or a secret government informer encouraged by the FBI to further the alleged conspiracy for the purpose of developing a criminal prosecution against petitioner.

Defense counsel believed that material evidence supporting the special undercover informer role of Itkin was contained in certain documents and reports regarding Itkin's relationship with the Federal government. The trial court withheld a substantial portion of this material from defense counsel after an *in camera* inspection of the requested documents and reports. The court allowed defense counsel to inspect only the material it thought was relevant. This is the very practice condemned in *Alderman* v. *United States*, 394 U.S. 165 (1968). This Court there held that

[25] The disclaimer by the Second Circuit of its supervisory authority in the present case is at variance with the assertion of such responsibility by the D. C. Circuit in its recent decisions in *United States* v. *Bryant* and *Turner*, Nos. 23,957 and 24,105, decided January 29, 1971. There the D. C. Circuit exercised its supervisory authority to require the adoption of "rigorous and systematic procedures" for controlling "the discretionary authority of investigative agents" in order to insure preservation of evidence. Slip Opinion, pp. 18-19.

in our adversary system, defense counsel, not the court, is best able to determine what evidence in requested materials is relevant to establish a crucial issue in his client's favor. An *in camera* inspection by the court, according to *Alderman*, impairs defense counsel's effectiveness in representing his client. 394 U.S. at 182-84. The *in camera* inspection and denial of access in the present case violated petitioner's Fifth and Sixth Amendment rights and undermined the fair administration of criminal justice.

II. The Out-of-Court Statements of an Alleged Coconspirator After Frustration of the Objectives of the Conspiracy Cannot Be Admitted in a Federal Conspiracy Case.

The present case illustrates in still another respect "the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges." *Krulewitch* v. *United States*, 336 U.S. 440, 457 (1949) (concurring opinion of Jackson, J.)[26]

The admission of the out-of-court statements of Fried against petitioner violated the rule recently reiterated by this Court in *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970):

> "It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies *only if the statement was made in the course of and in furtherance of the conspiracy* . . . ." (emphasis supplied)

This principle "has been scrupulously observed by federal courts." *Krulewitch* v. *United States, supra*, 336

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[26] "[L]oose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Id.* at 446.

U.S. at 443-44. This Court there held that statements of an alleged coconspirator made after the conspiratorial objectives charged in the indictment "either had failed or had been achieved" are not admissible because they are not pursuant to or in furtherance of the conspiracy. 336 U.S. at 442-43.

Since Mareus' resignation and the indictment of Fried frustrated the objectives of the alleged conspiracy, the Court of Appeals' decision upholding admission of the Fried out-of-court statements conflicts with these settled principles. Moreover, Fried's statements were not in furtherance of the alleged conspiracy because they were admissions of his own involvement and mere narrations of past occurrences. See *Wisuich* v. *United States*, 329 U.S. 211, 217 (1946); *Developments in the Law: Criminal Conspiracy*, 72 Harv. Law Rev. 920, 985 (1959). Even under the new theory of conspiratorial objectives invented by the Court of Appeals in this case, the statements were not in furtherance of the alleged conspiracy. On their face they refute the notion that Fried was seeking contracts from Con Ed in order to reimburse petitioner.

The Court of Appeals' effort to salvage the admission of the Fried statements by inventing a new theory of conspiratorial objectives contravenes the decision of this Court in *Krulewitch* v. *United States*, *supra*, that "continuing subsidiary objective[s]" of a conspiracy cannot be implied so as to stretch the applicability of the coconspirator rule. 336 U.S. at 443. The Court of Appeals decision also conflicts with this Court's holding in *Grunewald* v. *United States*, *supra*, that a new theory of conspiratorial objectives not tried or presented to the jury cannot be substituted on appeal in order to uphold a conspiracy conviction. This Court said: "the scope of the

agreement cannot be broadened retroactively . . . ." 353 U.S. at 414.

This Court should review this case to ensure compliance by the lower courts with its decisions limiting the scope of the coconspirator rule.[27]

III. The Prosecution's Use of Mistaken Testimony and Nondisclosure of Relevant Facts Denied Petitioner Due Process of Law and Was a Breach of Duty Under *Brady v. Maryland*.

The decision of the Court of Appeals with respect to the prosecution's use of the seriously mistaken testimony of Sister Ann James misconceived the obligation of the prosecution to disclose evidence favorable to the defense under this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963). It also employed an erroneous test to determine when the failure to disclose such evidence requires a new trial.

This case presents important issues which this Court granted certiorari to decide several years ago, and then did not reach, in *Giles* v. *Maryland*, 386 U.S. 66, 73-74 (1967): "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial." (Opinion of Brennan, J.)[28]

The Court of Appeals' holding that the prosecutor was relieved from his duty of disclosure by the "stress" of trial

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[27] Failure to adhere to the limited scope of the coconspirator rule as enunciated in *Dutton* v. *Evans*, *supra*, raises substantial questions under this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968).

[28] See 8 Moore, *Federal Practice* (Cipes Edit.), ¶ 16.06[1] p. 16-67; ¶ 16.06[3], p. 16-81.

is unjustified by *Brady* v. *Maryland, supra.* The Court of Appeals in effect required a finding of prosecutorial "misconduct" as the basis for a duty of disclosure in this case. (O. 31a) *Brady* imposes no such burden; it holds:

> ". . . the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

Brady looks to the impact of the nondisclosure on the defense, not to the prosecutor's motives or intentions. Here the impact on the defense mandated disclosure. The prosecutor conducted a suggestive photographic identification procedure for Sister Ann James during trial without the knowledge of defense counsel.[29] It led to an identification of the wrong man—an identification of which the witness herself was unsure. The prosecutor was aware of this uncertainty. Yet the witness made the mistaken identification at trial without giving any indication of uncertainty.[30] A request for disclosure of any *Brady* materials was made,

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[29] *Cf. Simmons* v. *United States*, 390 U.S. 377, 383 (1968), in which this Court said that the danger of misidentification is increased if a witness is shown "pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." The picture here was of an alleged coconspirator, rather than the defendant, but the principle is the same. The danger was realized; there was a misidentification.

See also *United States* v. *Zeiler*, 427 F.2d 1305 (3d Cir. 1970), holding that an arrested defendant has the right to be represented by counsel at a photographic identification because of the dangers of misidentification.

[30] It is difficult to understand the Court of Appeals' point that the time pressures on the prosecutor made it less appropriate to require him to disclose the uncertainty of his witness. Any trial lawyer would be immediately aware of the significance of a witness saying she was unsure of her identification.

including any impeaching evidence.[31] None was forthcoming. The prosecutor then used the mistaken testimony to establish that the defense witness Daniels perjured himself, and that petitioner had "brought corruption into the courtroom."[32] The mistaken testimony was crucial, since, as the Court of Appeals stated, if Daniels was believed, he "shattered" the testimony of Itkin on a critical point in the prosecution's case.

This Court should also clarify the law as to the degree of prejudice which must be shown to obtain a new trial when a duty of disclosure has been breached. The Court of Appeals here held that the defense was not entitled to the benefit of "'a fairly low showing of materiality'" of the newly discovered evidence (O. 31a) It was following its distinction between prosecutorial "misconduct" and non-deliberate, nondisclosure as laid down in *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968). There it held that a nondeliberate, nondisclosure case requires *"a substantially higher probability* that disclosure of the evidence to the defense *would have altered* the result." 391 F.2d at 148. (emphasis supplied)

This is not the rule in other Circuits, and it finds no warrant in *Brady* itself. The D.C. Circuit said recently:

> "Although the Supreme Court has not yet attempted to define this standard with precision, it is the law in this

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[31] Disclosure duties extend to evidence impeaching the credibility of a witness, since the "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); 8 Moore, *supra*, ¶ 16.06[3], p. 16-89.

[32] The prosecutor's argument contravened the ABA Standards Relating to the Prosecution Function and the Defense Function, Standard 5.8(b) (Approved Draft, 1971): "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence . . . ."

> circuit that the due process requirement applies to all evidence which '*might have led the jury to entertain a reasonable doubt about* [*defendants'*] *guilt*', and that this test is to be applied generously to the accused when there is 'substantial room for doubt' as to what effect disclosure *might* have had. . . . [T]he focus of our test is upon 'the ultimate *possibility* of harm to the defendant'." *United States* v. *Bryant* and *Turner*, *supra*, Slip Opinion p. 10 and n. 9. (emphasis supplied)

See also *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966); *Levin* v. *Clark*, 408 F.2d 1209, 1212 (D.C. Cir. 1967); *Jackson* v. *Wainwright*, 390 F.2d 288 (5th Cir. 1968).

IV. A Severance of Defendants Is Required When the Defenses Are Antagonistic and When Criminal Activity Relating to One of the Defendants Is Imputed by His Counsel's Improper Summation to the Other Defendant.

The severance of defendants when their defenses are antagonistic presents an important question under Rule 14 of the Federal Rules of Criminal Procedure, which should be resolved by this Court. The ABA, in the commentary to its Standards Relating to Joinder and Severance, Standard 2.3(b)(ii), p. 41 (Approved Draft, 1968) recommends that "defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other." The ABA rule should have been applied in the present case.

Corallo, petitioner's codefendant, offered a two-pronged defense: (a) he indeed was guilty of an earlier conspiracy with Marcus, Itkin and Fried (not petitioner) of a similar nature to the present charges; if the evidence linked

him to corrupt activities with these same prior coconspirators under the present indictment, it was merely additional proof of the earlier conspiracy for which he had already been convicted and could not be convicted a second time;[33] (b) although petitioner was guilty of the present charges, Corallo was not.

Corallo's defense forced petitioner to sit at trial before the jury beside a codefendant who, through his counsel, literally pointed the finger of guilt at petitioner. The devastating impact of the prejudicial joinder in this case was highlighted by the fact that Corallo's antagonistic defense did not come from the witness chair through testimony which could be challenged by petitioner. Corallo did not take the stand. Petitioner had no opportunity to confront the antagonistic codefendant and cross-examine him. Rather, Corallo's counsel, as part of his defense strategy, conceded in statements that were testimonial in nature that the bulk of the prosecution's case against petitioner was true.

The repeated expressions by Corallo's lawyer of his opinion as to the credibility of prosecution witnesses disregarded his professional obligations. What Corallo's counsel did was a violation of the Code of Professional Responsibility approved by the ABA, DR 7-106 (c)(3), (4). It was also a clear case of unprofessional conduct as set forth in the ABA Standards Relating to the Prosecution Function and the Defense Function. Standard 7.8(b) states:

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[33] The jury was instructed that they should acquit Corallo of conspiracy if they found that his activities were part of a broad and continuing conspiracy which included the earlier conspiracy. (Tr. 2691)

> "It is unprofessional conduct for a lawyer to express his personal belief or opinion in . . . the truth or falsity of any testimony or evidence . . . ."

The underlying basis of this standard is that a lawyer may not offer testimony to the jury except through witnesses sworn and subject to cross-examination. Petitioner was denied a fair trial by this conduct of Corallo's counsel and the trial court should have severed the case. The trial court's generalized instructions could not remove the fatal prejudice.

Corallo's concession of guilt and his implication of petitioner by endorsing the prosecution's testimony through his counsel's summation are analogous to a confession introduced at a joint trial made by one defendant implicating another defendant. This Court in *Bruton* v. *United States*, 391 U.S. 123 (1968), condemned this practice even when the trial court gives cautionary instructions. This Court held that when such prejudice arises, separate trials are essential.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 158—September Term, 1970.

(Argued September 18, 1970 Decided November 16, 1970.)

Docket No. 34689

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE G. DESAPIO,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* convicting Carmine DeSapio, after a verdict, of conspiring to violate 18 U.S.C. §§1951 and 1952 and of two substantive violations of 18 U.S.C. 1952, and from an order denying a new trial. Affirmed.

MAURICE EDELBAUM, Esq. (Edelbaum, Abrams, Feitell & Edelbaum, New York, New York, Lawrence K. Feitell, Esq. and Henry J. Boitel, Esq., of Counsel), *for Defendant-Appellant.*

JACK KAPLAN, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Arthur A. Munisteri, James Schreiber and Robert G. Morvillo, Assistant United States Attorneys, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge*:

In December 1968 a grand jury in the District Court for the Southern District of New York returned an indictment against Carmine DeSapio, Antonio Corallo, and Henry Fried. The latter's case was severed because of illness. After a four-and-a-half week trial, Corallo was convicted on one of the three counts charged in the indictment and acquitted on another, and the third count was dismissed as to him; he has not appealed.[1] Appellant DeSapio was convicted on one count of conspiring to violate 18 U.S.C. §1951, which prohibits the obstruction of commerce by extortion, and 18 U.S.C. §1952, which prohibits travel in interstate or foreign commerce or utilization of any facility in such commerce to commit bribery, and of two substantive violations of the latter section. More intelligibly stated, the charge was that DeSapio conspired with Fried and others to bribe James Marcus, then Commissioner of the New York City Department of Water Supply, Gas and Electricity to withhold permits sought by Consolidated Edison Company of New York, Inc. (Con Ed) until Con Ed would agree to award construction contracts to Fried's companies. DeSapio was sentenced to a term of two years

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1 Corallo was given a 4½ year prison sentence, the term to run concurrently with the three-year sentence imposed on a previous conviction which was sustained in *United States* v. *Corallo*, 413 F.2d 1306 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969).

imprisonment on each count concurrently and to fines of $1,500 on each of the three counts.

I.

A summary of the evidence is needed to understand DeSapio's legal contentions. In the interest of keeping this opinion to manageable size, we shall endeavor to limit ourselves to the essentials, although in doing so we necessarily omit much evidence which one side or the other would doubtless deem significant.

The story constitutes a second act in the drama involving Commissioner Marcus and Herbert Itkin, who combined the roles of underworld character and FBI informer, of which *United States* v. *Corallo, supra,* 413 F.2d 1306, was the first. The evidence in that case depicted how Marcus, hard-pressed by loan sharks, had agreed with Corallo, Itkin, and Daniel Motto to award a contract for the renovation of a reservoir in Jerome Park in the Bronx to a construction company headed by Fried without competitive bidding, in return for Fried's promise to kick back 5% of the price. This success led Corallo, Marcus, and Itkin to agree that similar arrangements should be placed in operation elsewhere. Corallo mentioned that Con Ed was a prime target since it was constantly making contracts and also was requiring permits from the Water Department to dig in city streets. Not long after this, but in ignorance of what had been planned, Con Ed requested Water Department approval of a project to reconstruct and enlarge a power transmission facility known as the "high line," 20 miles of which ran atop the Catskill Aqueduct on a City owned right-of-way in Westchester County.

The first approach to Con Ed was made by Milton Lipkins, vice president of Broadway Maintenance Corpo-

ration. At a luncheon he asked Max Ulrich, Con Ed's vice president for public relations, about the company's "relationships" with the Water Department. After saying they were "reasonable," Ulrich indicated two major projects in the offing that would require Water Department approval—the "high line" and a pump storage hydroelectric facility at Storm King Mountain near the Catskill Aqueduct. Lipkins said he had heard the company's relations with the Department were very bad and that, through his friends "who were close to the Department," these relations would be improved if Con Ed would award some 5% to 10% of its business to the Orlando Construction Company, headed by Edward Orlando. Lipkins gave Itkin a somewhat rosy version of his success at the conference. Itkin relayed the good news to Marcus and Corallo, who suggested that if the prospective Storm King construction contracts, estimated at $100,000,000, were awarded to certain construction concerns, the three might share 40-50% of the profits. There is no contention that DeSapio played any role in these preliminaries.

Late in June or early in July, Fried, who had learned of the démarche with Con Ed and was distressed at the prospect of being excluded from the business, asked Marcus to meet him, and Marcus requested Itkin to come along. After some small talk, in the course of which Marcus told Fried to speak to Itkin as if to himself and Fried invited Marcus and Itkin to the forthcoming opening of his multimillion dollar horsefarm in Germantown, N. Y., Marcus left. Fried then asked Itkin why he and Marcus were "fooling around" with little companies like Orlando, boasted of his ability to raise $250,000 for pay-offs on 24 hours notice, and claimed to have the chairman of the New York County Republican party, and DeSapio, past chairman of

the New York County Democratic party, on his payroll. Itkin did not immediately take up the lead; instead Lipkins pursued Ulrich, without success.

Early in August, Edward Orlando, who had decided to accept Fried as a "partner" on Con Ed contracts, met with him and Itkin. According to Itkin, Fried again deprecated the Lipkins-Ulrich gambit and said, "[i]f you want to deal, come up to my farm, and I will introduce you to Carmine DeSapio and then you will be really working it right." Fried recommended a route through New Jersey and accommodations in a nearby hotel. At a meeting in Itkin's apartment on August 15, Corallo expressed to Marcus and Itkin his dissatisfaction with Lipkins' lack of progress.

The opening of the horsefarm on August 20 was attended by approximately a thousand guests. Itkin, who had used the recommended route and hotel, arrived between 1 P.M. and 2 P.M. According to him, while he was sitting with Orlando early in the afternoon, Fried came up to his table and led him off to be introduced to DeSapio. Fried said he had spoken to each man separately and, if they could work together, he would do his end. DeSapio allegedly said Itkin had been handling himself poorly and offered to help if Itkin would agree to work with no one else. Itkin accepted and was sure that Marcus would also; DeSapio gave Itkin his unlisted office telephone number. In his testimony DeSapio admitted that he knew Fried well and attended the opening in the company of Frank G. Rosetti, leader of the New York County Democratic party, and their wives. He claimed that Itkin came up alone, introduced himself as a friend of Marcus, and asked what DeSapio thought of Mayor Lindsay's administration. On two later occasions during the afternoon Itkin gave the DeSapio-Rosetti party lifts to and from the clubhouse.

DeSapio did not see Fried except at the clubhouse toward the end of the day.[2]

Soon thereafter Itkin told Marcus that DeSapio had called and would "handle" the Con Ed negotiations. Later in the month Itkin asked Marcus if he knew about the high line; Marcus inquired of his engineers and learned about it for the first time.

Itkin claimed to have met DeSapio on September 6 at the coffee shop in the Biltmore Hotel. DeSapio reiterated his poor opinion of Itkin's and Marcus' tactics and warned Itkin to stay in constant touch with him since he had been getting "insurance contracts" with Con Ed for years.[3] He said the Storm King project was too big for a starter and that the conspirators should use the high line to teach Con Ed the necessity of dealing through them. DeSapio denied this meeting.

On the same day Con Ed's vice president and chief engineer, Duncan, called upon Marcus with respect to the delay since May 9 in approving the high line project. Reviewing Con Ed's request, Marcus indicated there was no problem so far as he was concerned, although he would need added technical data, and instructed Groopman, the Department's chief engineer, to prepare a letter to that effect. Itkin testified that, on his relaying this news, DeSapio was indignant since "[i]t is much too early for me to make a move to impress upon them [Con Ed] they have to come to me" and instructed that the letter be held

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2 Rosetti corroborated most of DeSapio's account but had not witnessed the initial encounter with Itkin.

3 The Government contends that the quoted phrase was a code used by DeSapio to describe illegal projects. Although DeSapio had been employed for 10 years by an insurance broker, J. B. Rappaport and Co., this agency, according to DeSapio's testimony, had written no insurance for Con Ed.

up. On learning this, Marcus took Groopman's draft letter to the office of the Corporation Counsel, hoping thereby to obtain the desired delay. Instead of pondering about the letter which, even as drafted by Groopman, was merely a consent in principle subject to approval of engineering details and a caveat that Con Ed's contract to use the right of way would have to be renegotiated with the Board of Estimate, Assistant Corporation Counsel Redlich immediately prepared an insert making clear that Con Ed was not to incur any expense in reliance upon the approval in principle until the Department notified the company that the construction would not harm the Catskill Aqueduct. Marcus decided not to send the letter but rather to hold back for a while and then refer the matter to the Director of the Bureau of Franchises for renegotiation of the fee.

A fortnight later Luce, the new chairman of the board of Con Ed, paid his first official visit to Mayor Lindsay, at Gracie Mansion, encountered Marcus there, and pressed for approval of the high line project. Marcus went back to his office and had the Groopman-Redlich draft typed but did not send it. Itkin testified that the next day he met again with DeSapio at the Biltmore dining room.[4] DeSapio objected again to Marcus' being too compliant. Itkin related the financial pressures on Marcus; DeSapio responded that Marcus should be patient and firm, and that $25,000 would be coming from the high line "for us." He also suggested that in telephoning he would refer to

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4 Itkin testified that on the preceding day he had met with Fried and Orlando, that Fried knew of the meeting with DeSapio which had been set for the following day, and advised Itkin to "do what he says," and that Fried also gave assurance that he and Orlando "are doing our side with Con Ed."

himself as "Mr. Carl" while Itkin should call himself "Mr. Herbert."[5] DeSapio denied this meeting.

Itkin emphasized to Marcus that he must hold back on the letter and would receive $10,000 when the right time came. This would be signalled by Itkin's telling Marcus to "send the letter to my niece Plumps in England."

After a telephone call from Luce pressing for the letter, Marcus referred the matter to the Bureau of Franchises for renegotiation of the fee, the procedure Marcus had earlier contemplated, but not acted upon, in his efforts to delay sending out the letter. He prepared a letter advising Con Ed of this but Itkin told him not to send it. Itkin claimed to have met DeSapio again at the Biltmore on September 29, and said that Marcus was now willing to return telephone calls made by Ebel, Luce's predecessor as chairman of the board of Con Ed and now chairman of the executive committee. DeSapio instructed Marcus to do this at an appointed date and time, October 9 at 11 A.M.; DeSapio would notify Con Ed of this in advance through Fried. It was also agreed that Itkin and DeSapio would split the $15,000 of the anticipated $25,000 payment remaining after Marcus' $10,000. DeSapio admitted having once met Itkin near the Biltmore coffee shop in October. He said that Itkin had proposed only that they should use their contacts to get something done about housing mortgage insurance.[6]

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5 Itkin's secretary testified to frequent calls between September and December 1967, from a woman who said Mr. DeSapio or Mr. Carl was calling. DeSapio denied ever using the pseudonym "Mr. Carl."

6 DeSapio and his secretary accounted for Itkin's finding him at the Biltmore coffee shop on the basis that Itkin had called his unlisted number and the secretary had indicated that he would be there. On the other hand, when interviewed by the New York County District Attorney's office, DeSapio made a statement which, as we read it, said

Marcus telephoned Ebel as arranged and saw him the next day. According to a report by Itkin to Marcus and Corallo at a meeting on October 11 which Itkin recorded, Ebel had emerged with the belief that the permit would soon issue; Itkin urged that Marcus disabuse him of this by professing outrage at a Con Ed advertisement disclosing that the high line would provide a nine-fold increase in power capacity, a circumstance which, more than ever, would entail a larger fee for the City. Marcus and Itkin testified that Itkin told Corallo at this meeting that De Sapio was to be the new intermediary with Con Ed. Defense counsel argues that the tape recording does not bear this out, and that the references to DeSapio concerned proposed "public relations" contracts with Brooklyn Union Gas Co., alleged by Itkin to have been discussed at the September 29 meeting with DeSapio. Although the tape is subject to more than one interpretation, the references to DeSapio's role with Con Ed are surely not so clear as Itkin's and Marcus' testimony about them.

Itkin testified he then told DeSapio that Marcus would again call Ebel, and DeSapio insisted on knowing the exact day and time. A telephone call from Itkin in New York to Marcus at his house at Beach Haven, N. J., fixed this, and Itkin relayed the information to DeSapio. DeSapio denied all of this.

We turn now to testimony by Con Ed's former vice president in charge of construction, Gerald Hadden, who testified under a grant of immunity. He had lunched on November 3 with Fried, from whom he had received cash gratuities since he had succeeded to the responsibility of

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he had called his secretary to find his messages and instructed her to inform three or four people, including Itkin, that he would be in the Biltmore cocktail lounge.

preparing the list of contractors permitted to bid on Con Ed construction jobs. Fried told of having heard that Con Ed was having difficulty with the City about the high line, which Hadden confirmed, and thought he could be of some help.

Max Ulrich testified that a week later Sidney Baron, head of a public relations firm with a consulting contract with Con Ed and a long-time friend of DeSapio, invited Ulrich to lunch and asked him to break an engagement to that end.[7] DeSapio was with Baron, who professed knowledge of Con Ed's problems, expressed doubt that Lipkins could assist, but thought DeSapio might be of help in view of his "knowledge and experience in governmental affairs." DeSapio expressed concern that the relations between two such vital organizations as the Department of Water Supply and Con Ed "were not particularly good" and thought he might be able "to act, perhaps, as some sort of a referee . . ." DeSapio admitted that he was present at the lunch and that Con Ed's problems with the Water Department were discussed, but denied that he had offered to assist.

We now return to Hadden. At another lunch, on November 17, Fried said he might have some friends who could help with the high line problem. Three days later DeSapio joined Hadden and Fried at lunch, asked Hadden to explain the permit problem, and said that maybe he could help. DeSapio's version was that he had come into the restaurant, which was across the street from his office, to look for his employer; that he had greeted Fried who introduced him to Hadden; but that there was no conversation.

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7 The other party to the engagement confirmed that this had been done.

Itkin testified that on the same day he spoke to DeSapio on the phone, and DeSapio said, "You can send that insurance policy out," see fn. 3. On November 21 Itkin gave Marcus the prearranged signal, but Marcus did not immediately respond. Hadden testified that on November 22 DeSapio again lunched with him and Fried, asked what Con Ed needed, and inquired whether a letter would do. In his testimony DeSapio insisted there had been only one encounter with Fried and Hadden, which was of the innocent sort described above.

According to Itkin, DeSapio telephoned him later that day in anger because no letter had been delivered. Itkin called Marcus, who had the non-committal letter taken to Luce late that afternoon. Itkin then went to DeSapio's office for the promised payment. DeSapio complained that the letter had been delivered to the wrong person. He called Fried, who advised holding Itkin and Marcus off. DeSapio demurred and told Itkin to come to his apartment two days later[8] when "I will have some of the money even if I have to lay it out in advance until I get it back from . . . Fried." DeSapio denied that any such conversation had occurred.

Itkin claimed that he went to DeSapio's apartment as arranged. DeSapio said he had heard the letter was "weak" but was advancing $5,000. Itkin assured him that Marcus would cure any deficiencies. Hadden testified that on the same day, November 24, Fried telephoned him and indicated that the letter had been despatched. When Fried called again on November 27, Hadden said the letter was worthless and sent Fried a copy.

Itkin asserted that on November 29 DeSapio gave him an additional $2,500 but would advance no more until Fried

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8 The intervening day was Thanksgiving.

reimbursed him. However, on December 4 he paid another $5,000.[9] DeSapio said that Fried had paid him only partially, that Fried had decided to pay only $20,000 since the letter was so weak, but that he would not reduce his $7,500 share. When Itkin protested, DeSapio said "it is only the beginning with us." DeSapio denied all of this, as well as the meeting described in the preceding paragraph.

Hadden recounted a third lunch with DeSapio and Fried on December 5. He repeated that the letter was worthless. DeSapio said "these people" were "hungry for money." Hadden thought nothing should be paid since the letter was not a permit, but Fried insisted he would still pay $20,000. DeSapio denied being present at any such meeting.

On December 12 Marcus resigned as Commissioner. Hadden invited Fried to lunch the next day and expressed concern. Fried told him not to worry although Fried said he had paid the $20,000, and gave Hadden $5,000 as a "Christmas present." Fried, Marcus, Itkin and Corallo were indicted on December 18 by a federal grand jury with respect to the Bronx reservoir contract.

It remains only to recount a final episode. On Friday, January 5, 1968, W. Donham Crawford, Con Ed's vice president for purchasing, summoned Fried to his office. Fried was informed he had been dropped from the list of contractors authorized to bid for Con Ed projects. After unsuccessful protests that such action was unjustified because he should be presumed innocent of the charges against him, Fried "out of the clear blue sky" declared "Well, you know $20,000 has been provided to Mr. Marcus and that

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9 This included two $2,000 packets of cash in wrappers of the Bank of North America. There was evidence permitting a conclusion that these, which were received in evidence, and their contents had come from Fried.

there was a luncheon at which this matter was discussed and present were CD [to wit, DeSapio] and JH [to wit, Hadden]." Fried added that "this was for the transmission line in Westchester." Crawford reported this to Luce, who informed Hadden, who in turn sent for Fried. The following Monday, January 8, Fried made another visit to Con Ed's offices. He stated to Hadden, and later repeated in Crawford's presence, "You are not involved in this at all." He added that he wanted to see Luce. Hadden was called away. After telling Crawford there was going to be a full exposé of the high line affair, Fried explained that in fact Hadden was involved, and that Duncan and Ulrich knew about the matter. He added that "DeSapio has to be made whole" and "I can take care of that." He renewed his insistence on seeing Luce or some other high Con Ed official to plead for restoration to the bidding list. His request was not granted.

Although counsel for DeSapio points to many weaknesses in the Government's case, notably Marcus' inability either to aid or to obstruct the high line project once he had placed the issue in the Bureau of Franchises, the worthlessness of the letter that produced the alleged payments, and the unlikelihood that Fried would make or authorize a kick-back with no assurance that Con Ed would depart from its competitive bidding procedures, he does not and could not properly contend that the evidence was insufficient for submission to the jury. His argument rather is that the case was a close one and that, in consequence, errors that might be regarded as non-prejudicial in an open-and-shut trial would be grounds for reversal here. We will consider the appeal on that basis.

II.

DeSapio's first point concerns the denial of his motion for a trial separate from Corallo's. There is and could be no claim that joinder was improper under F. R. Cr. P. 8(b); the contention is rather that the joint trial so prejudiced him as to render the refusal to grant a severance under F. R. Cr. P. 14 an abuse of discretion. As to this the Fifth Circuit has recently observed, *Tillman* v. *United States*, 406 F.2d 930, 935, *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969):

> The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review, 8 Moore, Federal Practice ¶14.02 [1], p. 14-3 (2d ed. 1968). The defendant must show something more than the fact that "a separate trial might offer him a better chance of acquittal." Id. at ¶14.104[1], pp. 14-14–14-15.

DeSapio's claim of prejudicial misjoinder must be appraised in light of the evidence and the positions of the parties. The proof left little doubt that Marcus, Itkin, and Fried were members of a conspiracy in which Marcus—by withholding or delaying the issuance of permits—would induce Con Ed to award construction contracts to Fried who would make payments to Marcus and Itkin in return. DeSapio did not deny the existence of such a conspiracy; he insisted that he had no part in it and that his participation had been invented by Itkin to increase Itkin's own stature with the FBI and other prosecutorial agencies. Corallo likewise did not dispute such a conspiracy; he claimed that he had not been allowed to participate or that, to such extent as he had been, this was simply a continua-

tion of the Bronx Reservoir conspiracy, in which, as the judge made crystal clear to the jury, it was plain DeSapio was not involved. There was no evidence, and no suggestion, that Corallo and DeSapio ever met or spoke to each other.

Mere statement of these facts sufficiently disposes of most of DeSapio's arguments on this score. Proof of the Bronx Reservoir conspiracy showed that Marcus, Itkin, Corallo and Fried had previously worked out kick-back agreements and thus was relevant to prove they could well have been continuing along the same line. But it had not the slightest tendency to prove DeSapio's participation in the Con Ed conspiracy, and it is no abuse of discretion to deny a severance merely because of the remote possibility that the jury might draw so irrational an inference. The same comment applies to references to other kickbacks mentioned in the recording of the October 11 meeting of Marcus, Itkin and Corallo. It is similarly unrealistic to suppose that pre-trial publicity and evidence showing Corallo to have been an underworld character could have "rubbed off" on DeSapio when there was no claim that he had ever had anything to do with Corallo. Such contentions take insufficient account of the intelligence and conscientiousness of the jury, the effective efforts of the judge to keep it on the beam, the skill of defense counsel, and the requirement under F. R. Cr. P. 14 that the defendant demonstrate substantial prejudice from a joint trial, not simply "a better chance of acquittal" at a separate one, *Tillman* v. *United States, supra;* 8 Moore, Federal Practice ¶14.04[1], pp. 14-14–14-19 (1970 ed.).

The only point deserving further comment under this heading is the claim that statements of Corallo's counsel, particularly in summation, in effect conceded the bulk of the Government's case. Although some of the passages quoted

in appellant's brief are taken out of context, we can still understand how "exasperating," to use Judge Medina's apt adjective, *United States* v. *Kelly,* 349 F.2d 720, 766 (2 Cir. 1965), *cert. denied,* 384 U.S. 947 (1966), the gushing summation for Corallo must have been to counsel who was making a tight defense on DeSapio's behalf. But here again counsel underestimates the jury's awareness of its responsibility to appraise the credibility of the witnesses and the immateriality of what Corallo's lawyer thought about portions of the Government's case, particularly in light of the court's admonition that "the lawyers . . . have no right to make any determinations of credibility of witnesses" and that their "comments were argument only."

III.

We next consider a variety of claims having the ambiguous role of Itkin as their common theme.

In *United States* v. *Corallo, supra,* 413 F.2d at 1320-22, the court was not required to reach similar contentions since it found no sufficient contradiction to Itkin's testimony "that whatever else he might have been doing with the FBI to uncover the machinations of the underworld, he was in this venture entirely on his own and acting wholly without the knowledge of the FBI until he found it to his interest to tell the FBI, after the last installment of the bribe had been paid." The record in this case would not support so broad a finding. At least from mid-summer of 1967 Itkin kept the FBI informed of the conspiracy's progress.[10]

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10 For example, Itkin gave his "contact" in the FBI, Agent Vericker, advance notice of his meeting with Marcus, and Corallo on August 15 and turned over the tape recording of it. The same occurred with respect to the October 11 meeting. In the interval he had been in touch with the FBI two or three times weekly. During the critical period leading up to and embracing his receipt of payoffs from DeSapio

Itkin testified on cross-examination that it was always his intention to turn over to the FBI information on deals that had been completed, that he would have pursued the larger Storm King projects on the same basis if that had proved possible, and that his "primary motive was never to make the money." On the other hand, the FBI never told him what to do. While he was "infiltrating, . . . picking and choosing as it came," the Con Ed venture was his own activity and he "was very definitely a participant." Vericker admitted the FBI knew that Itkin "had obtained illegal money" but denied that it had directed or authorized Itkin to participate in the Con Ed scheme and defended its failure to take earlier action on the ground that Itkin "was giving us a tremendous amount of information on labor racketeers, on hoodlums, and we did have this evaluation problem."

On the basis of these facts, DeSapio asks that, in the exercise of our supervisory power, and also as a matter of due process, we reverse the conviction because, as said in Chief Justice Warren's solitary dissent in *Hoffa* v. *United States,* 385 U.S. 293, 315 (1966), "the nature of the official practices evidenced here is offensive to the fair administration of justice in federal courts." The FBI's conduct indeed went far beyond the familiar cases of the revenue agent approached with a corrupt proposal who, after reporting it to his superiors and on their instructions, acts out the drama which is closely surveilled and often wired for sound, cf. *Lopez* v. *United States,* 373 U.S. 427 (1963); or of the narcotics agent who plays an equivalent role in a pusher's home, cf. *Lewis* v. *United States,* 385 U.S. 206 (1966). In

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in November 1967, Itkin made six contacts with Vericker. In addition, he turned over the two bank wrappers allegedly received from DeSapio on December 4—but not the $4,000 they contained.

such instances, while the government agent participates in a transaction having the elements of a crime, it is one without adverse social consequences; there is no intention that the revenue agent will keep the bribe or that the narcotics agent will sell the narcotics. Here the FBI sat by while people extorted money to induce official action, with knowledge that they planned to keep it for their own use. To be weighed against this, however, is the value of the information supplied by Itkin, revealing an extensive picture of corruption in high places, both in city government and in business, which had not theretofore been detected and very likely could not have been exposed in any other way. The difficulties courts have had in explicating and marking the boundaries of the defense of entrapment,[11] see *Sorrells* v. *United States,* 287 U.S. 435 (1932), *Sherman* v. *United States,* 356 U.S. 369 (1958), and the material in Hall, Kamisar, LaFave and Israel, Modern Criminal Procedure 421-38 (1969), suggest the inadvisability of attempting to develop a penumbral doctrine that would add to the many collateral issues now pervading criminal trials still another, a judicial determination whether the activities of an informer had passed some ill-defined acceptable bounds. Where, as here, there is no claim that the informer's activity infringed any specific of the Bill of Rights or any statute of the United States relating to the conduct of investigations, and the competing considerations are such that we are unable to conclude that it violates the "decencies of civilized conduct," *Rochin* v. *California,* 342 U.S. 165, 173 (1952), such decisions had best be left to the executive branch, which is accountable for its conduct to Congress.

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11 No claim is made on that score. The Government's case was that DeSapio was brought into the conspiracy by Fried and was a willing participant; DeSapio's case was that he never participated at all.

A second string on the Itkin bow is that if he was not a genuine member of the conspiracy, much testimony was wrongly received. DeSapio concedes, as he must, that, whether conspirator or not, Itkin could testify to anything that he knew the conspirators did or that DeSapio said in his presence. On the other hand, Marcus' testimony concerning narrations by Itkin would have had to be excluded unless Itkin was a member of the conspiracy. It is contended also that if Itkin was not a conspirator, the jurisdictional basis for the two substantive accounts would disappear since these were based on Itkin's travel through New Jersey to Fried's horsefarm and his telephoning Marcus in that state.

The evidence we have summarized warranted a conclusion that Itkin was participating in the conspiracy, even though he was currently reporting developments to the FBI and doubtless did not expect to be prosecuted. Whatever Itkin's motives may have been, and one can infer from the evidence that they were not always entirely consistent, the record clearly supports the finding that Itkin, on his own initiative, entered into an illicit agreement with Fried, Marcus, and others to carry out the high line venture. The contention that Itkin's disavowal of personal monetary benefit was inconsistent with his conspiratorial objective is sufficiently answered by our recent holding in *United States* v. *Peltz*, —— F.2d ——, —— (1970), slip opinions, 97, 102, that one can be a member of a conspiracy without seeking financial gain from the enterprise—however rare such a conspirator may be. Moreover, Itkin's having received and apparently kept some of the proceeds of the conspiracy casts doubt on his eleemosynary intentions; what he apparently meant by this testimony was that after paying for lunches and the like—his necessary "business" expenses—he had little left for himself.

The judge would thus have been justified in making an independent determination that Itkin was a conspirator and that his narrations were therefore admissible, *United States* v. *Geaney*, 417 F.2d 1116, 1119-20 (2 Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Instead, after summarizing the testimony, he told the jury that if they believed Itkin and Vericker, they should deem Itkin to have been a conspirator, whereas if they did not and determined "that the FBI specifically instructed or authorized Itkin to participate in the Con Edison scheme from the very beginning, then you could determine that Itkin was not a conspirator as contemplated by the law." He also instructed that if the jury determined that Itkin, as an agent of the Government, contrived to travel to Fried's farm via New Jersey and to call Marcus in that state for the sole purpose of conferring jurisdiction on the federal courts, they should acquit on the substantive counts.

Although counsel now criticizes these instructions as too limited, he did not do so when the judge invited an expression of disagreement, but excepted only to the court's refusal to instruct that Itkin was not a conspirator as a matter of law.[12] The defense was not entitled to such an instruction.

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12 This was the position reflected in Request No. 1 to charge. Counsel's statement must be taken as waiving the more moderate alternative reflected in Request No. 2. Similarly counsel's failure to except to the instruction with respect to travel constituted an abandonment of any point with respect to the difference between the instruction as given and Request No. 3. See *Armstrong* v. *United States*, 228 F.2d 764, 768 (8 Cir.), *cert. denied*, 351 U.S. 918 (1956); *Johnson* v. *United States*, 291 F.2d 150, 156 (8 Cir.), *cert. denied*, 368 U.S. 880 (1961). Cf. *United States for the use and benefit of D'Agostino Excavators, Inc.* v. *Heyward-Robinson Co.*, —— F.2d ——, —— (2 Cir. 1970), 1969 Term slip opinions, 3985, 3997-98.

IV.

DeSapio challenges the admissibility of several damaging statements made by Fried to Hadden on December 13, 1967 and to Crawford on January 5 and 8, 1968. His contention is that upon Marcus' resignation and indictment, the conspiracy ground to an abrupt halt since the conspirators could no longer utilize Marcus' office as a means of inducing Con Ed to award construction contracts to Fried; any declarations after that time, it is argued, could not be in furtherance of the conspiracy and were therefore improperly received. We do not question that if there were error in receiving Fried's statements, this would be sufficiently serious to require reversal, since these constituted the only testimonial support for Itkin's story of payments by DeSapio. We do not think there was.

The Government say that the argument here under consideration takes too narrow a view of the conspiracy. The indictment named as one objective that, as a result of informing Con Ed of Marcus' intention to misuse the powers of his office for his own benefit and to the detriment of Con Ed, Con Ed "would enter into contracts with the defendant HENRY FRIED that companies owned, controlled and designated" by him and that such "companies would pay him money in the form of dividends, salary and commissions." The prosecution argues that while Marcus' resignation and indictment indeed prevented any further use of his position for extortion on new Con Ed applications, it did not prevent the conspirators from endeavoring to secure what all along had been the only object of interest to Fried.

If the Government's argument depended on showing that Fried entertained any belief, at least on January 5 and 8, 1968, that he could obtain the high line contract from

Con Ed without competitive bidding, we should have to reject it. Fried was far too sophisticated to believe that the new Con Ed management would expose itself to suspicion, or worse, by departing from established bidding procedures in favor of a man just indicted for having given a kickback to the former Water Commissioner. Beyond that, counsel's cross-examination of Crawford made it clear that Fried's objective on January 5 and 8 was simply to be restored to the competitive bidding list.

We see no reason, however, why so much should be required. From the time of DeSapio's alleged entrance into the conspiracy at Fried's instance, it was contemplated that the money to be paid to Marcus, Itkin and himself would come from Fried, who would find his compensation in contracts with Con Ed. After DeSapio had advanced money, it was surely an important objective for him to receive repayment as well as his own promised share, and Fried remained the only source. While Fried might have decided to provide this in any event, and indeed once said he had done so, he chose to pursue the possibility that he might maintain profitable relationships with Con Ed by remaining on the bidding list and thereby make both himself and DeSapio "whole." That he believed his relations with Hadden and DeSapio's influence still carried some weight in attaining this more limited objective is apparent from the record. Since there is no evidence that DeSapio had withdrawn from the conspiracy at this time, he must be deemed to have authorized Fried to put this forward. Cf. *Pinkerton* v. *United States,* 328 U.S. 640, 646 (1946). A conspirator who has laid out money in the expectation of reimbursement from another member takes the risk that the latter may make imprudent disclosures in endeavoring to obtain the wherewithal. Such

declarations are no less in furtherance of the conspiracy because the prospects of success may now appear dim, the objectives of the conspiracy had become more limited and the hoped repetition of the conspiratorial endeavor was impossible.

We recognize, of course, that actions do not become acts in furtherance of a conspiracy *merely* because a conspirator is seeking a means of meeting the financial obligations he incurred therein, for example, if Fried had been removed from the bidding list of some other company not an objective of the conspiracy and had protested that he must be left on the list since he needed the wherewithal to make DeSapio whole. Here, by contrast, Fried was employing means contemplated by the original agreement—the use of his own and DeSapio's influence with Con Ed to achieve ends within the scope of the venture. This case is thus unlike *Krulewitch* v. *United States,* 336 U.S. 440 (1949) or *Grunewald* v. *United States,* 353 U.S. 391 (1957), which involved alleged continuing or subsidiary conspiracies "to conceal facts in order to prevent detection, conviction and punishment." 336 U.S. at 443. Rather than attempting to cover his tracks, Fried was making affirmative efforts to salvage what was left in the enterprise.

V.

DeSapio's other challenges to the conduct of the trial require much less comment. One of these concerns an interview by an Assistant District Attorney of New York County. DeSapio had been fully warned of his rights; indeed he was asked to bring a lawyer with him but declined. The complaint is that the interview was recorded and the recording gave rise to the contradiction noted in fn. 6. So long as *Lopez* v. *United States,* 373 U.S. 427, 439 (1963), remains the law, the claim is frivolous.

Counsel complains that "much of the cross-examination of DeSapio was acutely concerned with how DeSapio, in fact, makes a living and revealed the Government's preoccupation with depicting him as a back-office fixer and influence peddler having no professional training or skills to speak of except the resources of powerful friendships." If it was, this was permissible in light of DeSapio's description of himself as a legitimate employee of an insurance broker and his denial of Itkin's testimony that he had boasted of having obtained "insurance contracts," see fn. 3, from Con Ed for many years and having "almost everything boxed in in the City" along with his Republican counterpart. The only item where the prosecution would have overstepped the bounds was what, despite contrary protestations, we must regard as an attempt to put before the jury a well-publicized incident in which newspapers reported during 1957 that DeSapio had left a paper bag containing $11,000 in cash in a taxicab. However, the prompt objection of defense counsel aborted the inquiry before it could assume offensive form and the judge promptly struck out not only what there was of the question but also its predecessor, and instructed the prosecutor to start again.

While the prosecutor's summation was vigorous, it did not exceed the limits of fair argument, see *United States v. DeAlesandro*, 361 F.2d 694, 697 (2 Cir.), *cert. denied*, 385 U.S. 842 (1966), particularly in light of the emotional summation by defense counsel, and, save on several unimportant occasions, was not made the subject of objection. We have examined the materials which the trial court declined to make available to the defense under 18 U.S.C. §3500, and find no error in that ruling. Other trial errors claimed by DeSapio have been considered but do not merit discussion.

VI.

We come finally to the denial of DeSapio's motion for a new trial. Here some further facts must first be stated.

Near the end of its case, the defense called as a witness Harold Daniels, a brother-in-law of Henry Fried. Daniels testified that on August 20, the day of the opening of the horsefarm, he saw Fried at the clubhouse around 1:30 P.M.; that Fried was suffering from an attack of gout and couldn't walk; that he took Fried in his car to a parked school bus, holding forty to forty-five people, which Fried entered; that Fried asked him also to join the bus tours because Fried was physically unable to get in and out to show points of interest to the guests; that the bus made two such tours; that Fried was continuously on the bus until the completion of the second tour around 5:30 P.M., when Fried, who was carrying a cane, went to the clubhouse where the dedication ceremonies were held; and that Daniels did not see DeSapio until such ceremonies a few minutes later.

If this testimony was believed, it would have shattered Itkin's account of his meeting with Fried at the horsefarm and also of Fried's having related an earlier meeting there with DeSapio, and would have confirmed DeSapio's testimony that he did not see Fried except at the clubhouse toward the end of the day. With the taking of testimony scheduled to close on the following day, the Government was forced to act with more than deliberate speed. Using the horsefarm guest-book as its source, it obtained four witnesses whom it offered in rebuttal.

Mrs. Gordon Auchincloss testified she saw Fried near the swimming pool on the farm around 2 P.M. and again about an hour thereafter, and thought she had seen him in a tent still later. She was "not conscious" of his using a

cane. Monsignor Kane said that, after arriving at the farm around 3 P.M., he met Daniels and visited the latter's mansion nearby. Later he was introduced to Henry Fried at the race track. Ulrich testified that when he arrived at the farm about 2 P.M., Henry Fried was standing at the entrance greeting the arrivals. When Ulrich saw him in the same general location about an hour later and went over to thank him for the invitation, Fried suggested that they look at the indoor track, to which Ulrich drove him, and also at his new home, where Fried conducted a 15 minute tour. Finally Sister Ann James, a student nurse at the Carmelite Sisters Home for the Aged and Infirm, testified that "Mr. Fried" had walked over to the swimming pool around 2:30 P.M., and that she did not believe he was on the bus she entered for a tour around 2 P.M. She had previously met Henry Fried, "but not personally," when he visited the Home.

The motion for a new trial was predicated on an attack upon the testimony of two of the four witnesses. At a hearing on the motion conducted by the district judge, Monsignor Flanagan, who had attended the opening along with Monsignor Kane, placed their visit to the Daniels mansion at five o'clock as opposed to Kane's version of shortly after three. More important, it turned out that Sister Ann James' testimony was founded on a serious mistake. On returning to the Home from the courthouse, she had looked for a photograph that had been taken while she was on the farm with "Mr. Fried." She found this was Richard Fried; he looked nothing like his brother Henry, who had indeed visited the Carmelite Home. She immediately communicated this to the lawyer for the order, John J. Kelly, who had accompanied her to court that morning. He did not advise the court or counsel about this

serious error until after the verdict, and then only as a result of an investigation initiated by defense counsel. At the post-trial hearing the Government bolstered its case with testimony by two new witnesses whom it had located in the interval. Richard Staats, the driver of the bus, testified that neither Henry Fried nor Daniels was on it at any time, that Henry Fried was walking about the grounds without a cane, and that Fried came up to the bus and gave him a $10 tip at the end of the day. William Foster, a guest, who also testified that Henry Fried was walking around "meeting the people and talking to the people," identified motion picture photographs he had taken between 3 and 3:30 P.M. In one Daniels appears on the grounds *sans* Henry Fried, in another Henry Fried is standing with a group *sans* Daniels.[13] On the basis of this evidence the judge denied the motion for a new trial.

If the motion is viewed simply as one based on newly discovered evidence and free from any question of prosecutorial misconduct, the denial was well within the judge's discretion. This is so whether the applicable test is the formulation of *Berry* v. *State*, 10 Ga. 511, 527 (1851), namely, whether the new evidence "is so material that it would probably produce a different verdict, if the new trial were granted" or of *Larrison* v. *United States*, 24 F. 2d 82, 87 (7 Cir. 1928), namely, whether it might have produced a different verdict. See *United States* v. *Miller*, 411 F.2d 825, 830-31 (2 Cir. 1969), and the cases there cited.[14] While the newly discovered evidence indeed can-

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13 We have viewed the pictures in the presence of counsel. While we agree with appellant that Fried is not moving, he was standing on the grounds and no cane was visible.

14 The Government points out in brief that *Larrison* dealt with a situation where a principal prosecution witness had made an affidavit (later repudiated) that he had given false testimony *at the instance of Post*

celled out the evidence of Sister Ann James, it left the testimony of Mrs. Auchincloss and Ulrich unimpaired and simply created a contradiction with respect to Monsignor Kane's. However the matter might stand if that were all, the testimony of Staats and Foster and the motion picture film constituted such a devastating contradiction of Daniels' testimony that, as the Government suggests, it seems exceedingly doubtful that skilled counsel would even use that in a new trial.[15] Beyond all this, it defies belief that, with a thousand people in attendance at the horsefarm, whose names were available, the defense could find no one but Henry Fried's brother-in-law to testify that Fried was afflicted with gout, was consequently unable to greet his guests, and had to spend most of the afternoon in a bus—if such were the facts.

Appellant contends we should apply the less severe test of probable effect which we follow in instances of prosecutorial misconduct. *United States* v. *Keogh*, 391 F.2d 138, 146-47 (1968); *United States* v. *Miller, supra*, 411 F.2d at 830-32; *United States* v. *Polisi*, 416 F.2d 573, 577-79 (1969). The items of alleged misconduct are:

(1) That, before testifying, Sister Ann James had been shown a group of four or five photographs including one of Henry Fried on which his name had appeared whereas the others bore no names;[16]

Office inspectors. This would account for the departure from the *Berry* test, which the opinion did not mention. In fact the *Larrison* court denied a new trial. We are inclined to agree that the less severe *Larrison* test should be confined to cases of prosecutorial misconduct.

15 Apparently Daniels has died but his testimony at the instant trial would, of course, be usable if the defense wished.

16 Something is also sought to be made of the fact that one photograph was of a woman. While this was a stupid mistake, it obviously was not directed to leading Sister Ann James to make a misidentification of Henry Fried.

(2) That the prosecution did not reveal to defense counsel that the photographs had been exhibited;

(3) That the prosecutor allegedly concealed that Sister Theresa,[17] who had accompanied Sister Ann James both to the horsefarm and to the courthouse, had been unable to identify the photograph of Henry Fried;

(4) That, as the defense would also have proved through Sister Theresa, Sister Ann James had expressed doubt to the prosecutor about her identification of the photograph which the prosecutor did not reveal; and

(5) That the prosecutor deliberately couched his questions to Sister Ann James in terms of "Mr. Fried," knowing that she was thinking of Richard rather than Henry.

We can speedily dispose of (2). While it might have been better practice for the prosecution to have put the defense on notice of the photographic identification, compare *United States ex rel. Phipps* v. *Follette,* 428 F.2d 912, 913 & n. 1 (2 Cir. 1970), experienced counsel must surely have been aware of this possibility, and there is no reason to doubt that the court would have allowed a *voir dire* on this subject if request had been made. We can also quickly dispose of (5), on quite different grounds. If the prosecutor had deliberately indulged in any such tactic as the defense claims, this would warrant the most stringent condemnation and appropriate corrective action. But we see no evidence that he did. Sister Ann James had identified

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17 The court did not allow the defense to call Sister Theresa at the post-trial hearing.

Henry Fried's photograph and, so far as the record shows, had said nothing about Richard. The criticism of the prosecutor thus depends on reading into his conduct at the trial knowledge he obtained only later.

The prosecution explains item (1) on the basis that its only available photograph of Henry Fried bore his name, that it endeavored to conceal this from Sister Ann James by arranging the photographs so that the name would be covered, but that there was an unintended slip-up. We find no misconduct in the showing of the photographs; with time running against it, the prosecution had to make do with what it had. It is a closer question whether the slip-up created a duty of disclosure that the mere showing of photographs would not. Here again it is necessary to avoid viewing the prosecutor's actions on the basis of hindsight and to make some allowance for the haste with which he was forced to act.

This leaves only items (3) and (4). Since in our view the court should have allowed Sister Theresa to testify, we will assume *arguendo* that she would have given evidence in accordance with counsel's offer of proof. This was not that Sister Theresa would assert that she had not seen the man whose photograph had been exhibited, but only "that she could not identify any of the pictures because of the length of time," over two years. While the defense might have liked to know this, we do not believe it was so significant that non-disclosure was a breach of the prosecutor's obligation, especially since the defense could easily have learned of Sister Theresa by asking Sister Ann James whether she was accompanied as Sisters usually are. This leaves only item (4). Viewing the matter with the benefit of hindsight, and assuming that the facts were as stated in the offer of proof, we are bound to say

it would have been better if the Assistant District Attorney had revealed Sister Ann James' uncertainty before or during her examination. Still this case is a long way not only from "a considered decision to suppress, taken for the very purpose of obstructing," and even from "a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention," *United States* v. *Keogh, supra,* 391 F.2d at 146-47. Sister Ann James was one of four witnesses called to contradict Daniels' story, even though very likely the most impressive. Revelation that she had not been absolutely sure of her identification of the photograph, although she was reasonably sure that the man she saw at the horsefarm was Henry Fried, who had admittedly visited the Home, would hardly have been of "high value to the defense." Here, as in the case of the interrogation about "Mr. Fried," the defense embroiders later developments into a sinister cloak over prosecutorial omissions "where hindsight discloses that the defense could have put the evidence to not insignificant use," *United States* v. *Keogh, supra,* 391 F.2d at 147. As already noted, the prosecutor's conduct must also be considered in light of the defense stratagem of calling Daniels as one of its last witnesses and the consequent need for preparation of rebuttal testimony after the trial recessed that afternoon and before it began the next morning. Prosecutors under such stress cannot properly be held to standards quite as exacting as those that may be appropriate when they have had days or even weeks to consider whether a disclosure should be made. We thus do not find this to be a case where the defense is entitled to the benefit of "a fairly low showing of materiality," 391 F.2d at 148, of the newly discovered evidence.

On careful review of the entire record we are satisfied that Carmine DeSapio was accorded a fair trial conforming to law, and that the judge was warranted in refusing to direct a new one. The verdict must therefore stand.

Affirmed.

APPENDIX B

Order of United States Court of Appeals Denying Rehearing

34689

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARMINE G. DESAPIO, *et al.*,

Defendants,

CARMINE G. DESAPIO,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue release pending the filing and determination of a petition for certiorari in the Supreme Court of the United States having been filed herein by counsel for the appellant, Carmine G. DeSapio.

Upon consideration thereof, it is

Ordered that the petition for rehearing be and it hereby is denied and that the alternative motion for a stay of the mandate pursuant to FRAP 41(b) be and it hereby is granted.

HENRY J. FRIENDLY
J. JOSEPH SMITH
PAUL R. HAYS
Circuit Judges

December 28, 1970

Order of United States Court of Appeals Denying Rehearing, *En Banc*

34689

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARMINE G. DESAPIO, *et al.*,

Defendants,

CARMINE G. DESAPIO,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Carmine G. DeSapio, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD

December 28, 1970

APPENDIX C

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

18 U. S. C. § 371 provides in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U. S. C. § 1951 provides in pertinent part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. (b) As used in this section— . . . (2) The

term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

18 U. S. C. § 1952 provides in pertinent part:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to— (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both. (b) As used in this section 'unlawful activity' means . . . extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Rule 14 of the Federal Rules of Criminal Procedure provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1395

CARMINE G. DESAPIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a lengthy jury trial with co-conspirator Antonio Corallo in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 1951 and 1952 and of two substantive violations of the latter section. He was sentenced to concurrent two-year prison terms and to fines of $1,500 on each of the three counts. The court of appeals affirmed in a comprehensive opinion, 435 F. 2d 272 (Pet. App. A).

In brief, petitioner was charged with and found guilty of having conspired with one Henry Fried and others to bribe James Marcus, then Commissioner of the New York City Department of Water Supply, Gas and Electricity, to withhold permits from Consolidated Edison Company of New York, Inc., until it would agree to award construction contracts to Fried's companies.

The complex facts of this case are fully detailed in the opinion of the court of appeals (Pet. App. A 3a-13a).

Petitioner here reasserts claims considered and rejected by the court of appeals: (1) that certain testimony by and concerning Herbert Itkin, a government informer, should have been excluded, on the grounds that he was not a member of the conspiracy and that, in the circumstances of this case, the government's actions on this score were fundamentally unfair (Pet. 21-28, answered at Pet. App. A 16a-20a); (2) that the district judge's *in camera* inspection of government materials showing Itkin's relationship with the government and the restrictions on defense counsel's examination of these materials was inconsistent with *Alderman* v. *United States*, 394 U.S. 165 (Pet. 28-29, answered at Pet. App. A 24a);[1] (3)

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[1] *Alderman*, of course, involved a defendant's right to see evidence allegedly obtained from him or his premises in violation of his Fourth Amendment rights, so that he could effectively litigate the question whether other evidence used against him should be suppressed as the fruit of such illegal evidence. The contention in this case arises in the very different context of an effort to discover information, not

that the judge improperly admitted evidence concerning events after termination of the conspiracy (Pet. 29-31, answered at Pet. App. A 21a-23a); (4) that the prosecution failed to disclose relevant facts concerning one of its witnesses as required by *Brady* v. *Maryland*, 373 U.S. 83 (Pet. 31-34, answered at Pet. App. A 25a-31a); and (5) that petitioner was improperly denied a trial separate from that of his co-conspirator Corallo (Pet. 34-36, answered at Pet. App. A 14a-16a).

We rely here on the thorough treatment of these matters by the court of appeals; for the reasons stated in the opinion below the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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directly involving petitioner, about a third-party witness' activities; the *Alderman* opinion itself distinguishes the use of *in camera* procedures in this context, 394 U.S. at 182-183 note 14.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1395

CARMINE G. DESAPIO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1970

No. 1395

Carmine G. DeSapio,

Petitioner,

—v.—

United States of America,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The "Memorandum" of the Solicitor General is an extraordinary response to the serious and important questions raised in the petition for certiorari.*

The Solicitor General does not deny that this case raises novel and substantial issues of federal criminal law. He does not assert that this case turns on its own facts or that it involves no question of general applicability. He makes no effort to reconcile the decision below either with the decisions of this Court or with those of other Circuits.

I.

Most striking of all is the Solicitor General's silence on the most critical issue in this case—the role of professional informer Herbert Itkin and his relationship to federal law enforcement officials. The full facts as to Itkin's

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* The Solicitor General states that petitioner "here reasserts claims considered and rejected by the court of appeals." (Memorandum p. 2). Every petition for certiorari must do so in order to receive consideration by this Court, and this has not heretofore been considered a ground for denial of certiorari.

true status remain unrevealed, although these facts are peculiarly within the knowledge of the government. The court below conceded that Itkin's true role is controlling, since if he was not a "genuine" coconspirator, the case against petitioner cannot stand. (O. 19a) The court below decided this case on the assumption it was "a close one" and also candidly acknowledged that this case is unprecedented —no other decision has ever gone so far in approving a conviction obtained through the commission of serious crimes by a secret government informer and no decision of this Court validates the practices shown here. (O. 13a, 17a-18a)*

The Solicitor General seeks to uphold petitioner's conviction on the basis of the finding of the court below that Itkin was a genuine coconspirator. Yet the Solicitor General told this Court six months ago, in supporting Itkin's removal of his pending state prosecutions to federal court:

> ". . . Itkin was not 'an individual sent on a specific errand or whose employment was restricted to the performance of a particular chore.' [citation omitted]

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* The very statement of this issue by the Court below shows that plenary consideration by this Court is merited:

> "The FBI's conduct indeed went far beyond the familiar cases of the revenue agent approached with a corrupt proposal who, after reporting it to his superiors and on their instructions, acts out the drama which is closely surveilled and often wired for sound, [citation omitted]; or of the narcotics agent who plays an equivalent role in a pusher's home, [citation omitted]. In such instances, while the government agent participates in a transaction having the elements of a crime, it is one without adverse social consequences; there is no intention that the revenue agent will keep the bribe or that the narcotics agent will sell the narcotics. Here the FBI sat by while people extorted money to induce official action, with knowledge that they planned to keep it for their own use. . . . [The] determination whether the activities of an informer had passed some ill-defined acceptable bounds . . . had best be left to the executive branch, which is accountable for its conduct to Congress." (O. 17a-18a).

> Rather he was a *freewheeling federal informant* whose *duties* were 'to infiltrate organized crime wherever possible . . . .' " (Brief for the Respondent in Opposition, *State of New York* v. *Cooper,* No. 825, O.T. 1970, *cert. denied,* January 12, 1971, p. 12) (emphasis supplied throughout this Reply)

That Brief and Itkin's Brief were sealed and unavailable to us at the time of the filing of the petition for certiorari in this case. They have since been made available pursuant to the order of this Court entered April 5, 1971.

In his Brief supporting removal the Solicitor General also referred to "Itkin's role as an *undercover agent*", his "broad role to infiltrate organized crime", and "his *duties* as a federal informant." (*Id.,* pp. 12-13) None of these characterizations of Itkin's role by the Solicitor General is consistent with the opinion of the court below, on which the Solicitor General now relies as the sole support for denial of a writ of certiorari in this case.

Itkin's Brief to this Court further confirms that Itkin was a government agent during the period covered by the indictment in the present case. It states:

> "From 1953 to 1960, Mr. Itkin's relationship with the CIA was on an occasional basis. However, from 1960 through 1967, Mr. Itkin reported to the CIA on a daily basis. In 1963, the CIA requested Mr. Itkin to meet with high officials of the FBI. Mr. Itkin did so and agreed to work for the FBI as an informant. From the time of that meeting until the resulting testimony in 1967, Mr. Itkin reported on an almost daily basis to the FBI [citation omitted]."
>
> "Mr. Itkin, during this period of 1963 through 1967, was an informant for both the FBI and the CIA. Both agencies gave Mr. Itkin considerable discretion in his investigations and his activities. However, Mr. Itkin

carried out numerous specific assignments developed by said agencies at their request." Brief for Respondent Herbert Itkin in Opposition, p. 4.

II.

There is an even deeper inconsistency between the Solicitor General's positions before this Court on the Itkin removal case and this case. In supporting Itkin on removal, the Solicitor General urged:

> ". . . Itkin has set forth sufficient facts to justify the initial conclusion of the district court that Itkin's participation 'in the acts forming the basis of the State prosecution were performed in furtherance of, and under color of, the role of an informer' [citation omitted]. He is, in short, entitled to present in a federal court his defense that he was acting under federal authority." Brief for the Respondent in Opposition, *supra*, p. 16.

The Solicitor General further stated:

> ". . . it is not unlikely that on a trial on the merits federal agents will be called upon as witnesses and required to produce records in order to clarify Itkin's role." (*Id.*, p. 14)

That is precisely what the defense tried to do at the trial in the present case—to gain access to all information which would "clarify Itkin's role" and show that he was not a "genuine" coconspirator but a government agent. The defense was denied such access in the trial court, and the Solicitor General here upholds that denial. In fact, the one point in the petition for certiorari to which he addresses himself is our contention that the trial court's restriction on defense counsel's examination of materials showing Itkin's relationship with the government was inconsistent with this Court's decision in *Alderman* v. *United States*, 394 U.S. 165 (1968).

The Solicitor General's attempt to escape the application of the *Alderman* principle to the present case is astonishing. He states that, whereas *Alderman* involved discovery of evidence illegally obtained from a defendant, the contention in this case "arises in the very different context of an effort to discover information, *not directly involving petitioner,* about a third-party witness' activities." (Memorandum, pp. 2-3 note 1)

It defies understanding how the relationship of Itkin to the government and Itkin's activities as a secret informer can be characterized as "not directly involving petitioner." Itkin's relationship to the government and his activities at the time of the events in the present case are the key to this case. Unless the key is turned, the truth cannot be known. The validity of petitioner's conviction depends on whether Itkin was a "genuine" coconspirator or a government agent. As we pointed out in our petition (pp. 21-22), Itkin played at least the following parts in the prosecution of petitioner:

1. he initially corrupted James Marcus and instigated the alleged conspiracy which was the subject of the present case;

2. he reported to law enforcement officials on the progress of the alleged conspiracy;

3. he engaged in a number of the overt acts which were offered to support the conspiracy charge;

4. he made out-of-court statements which were introduced against petitioner under the coconspirator rule;

5. he created the federal jurisdiction and the sole basis for the substantive counts by committing the only two interstate acts involved in the case; and

6. he was the principal witness against petitioner at trial.

Moreover, a short answer to the Solicitor General's defense of secrecy is: without disclosure of the facts to defense counsel and the opportunity to make a showing on the issue, how is it possible to know that Itkin's relationship to the government and his activities are matters "not directly involving" petitioner? In this regard, the Solicitor General's reference to footnote 14 of the *Alderman* opinion is erroneous and inexplicable. Indeed, footnote 14 supports petitioner by quoting with approval this Court's earlier statement in *Dennis* v. *United States,* 384 U.S. 855, 874-75 (1966), that ordinarily "[t]rial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony", and that it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities." This Court further stated in *Dennis*:

> "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 384 U.S. at 875.

Dennis, like *Alderman,* justifies our contention that this is an exigent case for disclosure. This Court said in *Dennis*:

> "A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. [citation omitted]. Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for de-

> termining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." 384 U.S. at 873.*

How can the Solicitor General have argued to this Court in Itkin's removal case that Itkin is entitled to prove in a federal court that he was a government agent and still fairly argue in the present case that petitioner is not entitled to full disclosure of the facts and a full hearing on the merits on the identical issue? It is not enough for the Solicitor General to invoke the opinion of the court below. For if Itkin can prove he was a government agent, the premise of the opinion below is gone and by the very terms of that opinion, petitioner's conviction is invalid.

The government's inconsistency places it in the untenable position of seeking merely to retain petitioner's conviction in the present case, a position incompatible with the duty of the prosecution "to seek justice, not merely to convict." ABA, Standards Relating to the Prosecution Function and the Defense Function, Standard 1.1(c) (Approved Draft, 1971); ABA, Code of Professional Responsibility, EC 7-13.

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* Contrary to the Solicitor General's assertion that the *Alderman* contention was "answered" by the court below (Memorandum, p. 2), the court said only that it had "examined the materials which the trial court declined to make available to the defense under 18 U.S.C. § 3500" (the "Jencks Act") and found no error. (O. 24a) The defense inquiry was not limited to Jencks Act statements, however; the defense was seeking to explore the relationship between Itkin and the government. Moreover, *in camera* inspection by the Court of Appeals, without disclosure to the defense, is no more acceptable under *Alderman* than such inspection by the trial court.

III.

The Solicitor General's references to the opinion of the court below on the other points raised by the petition are equally unresponsive. This is most apparent in his treatment of our contention as to the inadmissibility of the post-conspiracy statements. He states that this contention was "answered" by the opinion below. (Memorandum, p. 3). But a comparison of the petition (pp. 11-14, 29-31) with the portion of the opinion below cited by the Solicitor General (O. 21a-23a) shows that this is not and could not be so.

The court below rejected the prosecution's theory of conspiratorial objectives and in its opinion substituted a new theory, never presented to the jury, in order to hold these statements admissible. The opinion of the court below did not "answer" this point of the petition—the opinion generated it. And as the court below conceded, if there were error in receiving these statements, "this would be sufficiently serious to require reversal . . . ." (O. 21a)

Each of the other points in the petition raises a substantial question justifying the granting of a writ of certiorari in this case. They are fully presented in the petition, and the supporting arguments need not be repeated here in light of the Solicitor General's failure to respond to them directly.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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